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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1929

No. 338

FRANK H. DOHANY,

Appellant,

vs.

FRANK F. ROGERS, State Highway Commissioner for the State of Michigan, et al.,

Appellees.

REPLY BRIEF OF APPELLANT

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FRANK H. DOHANY,

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FRANK F. ROGERS, State Highway Commissioner for the State of Michigan,

DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY, a Michigan Corporation, and

THE H. W. NELSON COMPANY, of Chicago, Illinois, a foreign corporation,

Appellees.

APPELLANT'S REPLY BRIEF

Pursuant to leave granted at the conclusion of Appellant's oral argument in this cause, Appellant files this, his Reply Brief.

DEDUCTION OF BENEFITS

It will be recalled that on the oral argument, Mr. Justice Butler put the following questions to Mr. Clardy, the Assistant Attorney General, and received the following answers:

> Q. Is it your contention that under the Highway Act benefits can be deducted?
>
> A. Yes.
>
> Q. Is it your contention that under the Railway Act benefits cannot be deducted?
>
> A. Yes.

Mr. Clardy further assured this Court that benefits would not be deducted, and that this Appellant would be afforded the advantages of the same measure of damages under either condemnation act.

A reference to Appellant's sworn Bill of Complaint (Rec. pp. 8 and 9) which must be accepted by this Court as the facts upon which to predicate its opinion, discloses that benefits were deducted by the State Highway Commissoner, from the damages which in his opinion should be paid to the Appellant for the taking of his property as follows:

> "No. 3. That the description of each of said parcels of land to be acquired for said public highway purpose as aforesaid, the damages which, in my opinion, should be paid as compensation for the taking of each parcel of such property, *after deducting benefits accruing to the owners of each of said parcels of land by reason of the improvement*, as hereinbefore indicated, and the name of each person interested in each

such parcel, so far as known, are as follows: * * *

Property of Frank H. Dohany * * *

Owner: Frank H. Dohany.

Damages $23,562.50 (Rec. pp. 8 and 9).

The damages above indicated were a tentative amount, which the Highway Condemnation Act required the State Highway Commissioner to deposit upon making his determination of necessity for the taking of lands, under the Highway Condemnation Act, and these damages would be paid to the property owner as his damages, in case he took no further part in the proceedings before the three Court Commissioners.

Not only do we find that the State Highway Commissioner, deducted benefits when determining the damages, which in his opinion, should be paid to Appellant for the taking of his property, but also that he failed to include any amount for consequential damages to the remainder of Appellant's property. He was proceeding under Sec. 4 of the Highway Condemnation Act, which provides, among other things, as follows:

> "Whenever the Commissioner shall be unable to agree with any person for the purchase thereof, the Commissioner may make a written determination of the necessity of the particular road construction project for which such property is desired, the necessity for taking the particular property described, and the damages which, in the opinion of the Commissioner, should be paid as compensation for the *taking* of each parcel of such property. * * *"

It further appears from the record (p. 9) that the acreage taken from Appellant was 7.250, and that the

damages to Appellant, in the opinion of the Highway Commissioner, were $23,562.50. By dividing the latter by the former, we find that Appellant was allowed exactly $3,250 per acre for the land actually taken, after deducting benefits, as above set forth, in said Determination, and was given nothing as consequental damages to the remainder of his tract. This supports our contention that the Highway Commissioner followed literally the requirements of the Highway Condemnation Act, in fixing the damages, which in his opinion, should be allowed to Appellant for the taking of his land for railway use.

So here we find, notwithstanding the replies of Mr. Clardy to the interrogations of this Court, that the State Highway Commissioner did deduct benefits from the damages which in his opinion should be paid to Appellant, although it is conceded by Mr. Clardy that the Highway Commissioner would have had no right to do so under the Railway Condemnation Act. After the State Highway Commissioner filed his Determination of Necessity, stating the damages, which in his opinion, should be paid to Appellant, he then claimed the absolute fee simple title to Appellant's land, and took possession thereof in accordance with the Highway Condemnation Act. It is only fair to assume, in view of his former attitude, that the Highway Commissioner will ask the three Court Commissioners to deduct benefits when fixing Appellant's damages, in conformity with the Highway Act.

Furthermore, under the Railway Condemnation Act not a sod could have been turned on Appellant's land until an award, by a jury, including consequential damages, and from which benefits had not been deducted, had been deposited with the Oakland County Clerk;

while, on the contrary, in this proceeding under the Highway Act we find Appellant already deprived of his property for a period of two years, and the grading completed through the same.

We find the following statement on page 84 of the Attorney General's brief in behalf of Appellee Rogers:

> "*Thus far in the proceedings* the State has made no attempt to ask the Commissioners to consider any *benefits* that may accrue to appellant's property, and the State has been offering proof without any reference to such benefits."

It will be noted the Attorney General did not say that in the future no testimony *would* be taken on the question of benefits. It has been his contention all the way through this proceeding, and he so stated to this Court, that under the Highway Act under which the proceedings were brought, the benefits could legally be deducted. Any oral statement which Mr. Clardy has made here to the contrary, will not be binding upon him in the proceeding before the three Court Commissioners assessing Appellant's damages. Furthermore, the three Court Commissioners who are now assessing Appellant's damages, are the sole judges of both the law and the facts in the case. The Attorney General nor anyone else can prevent them from deducting benefits from Appellant's award, in keeping with the Highway Condemnation law in the proceeding under that Act. Suppose the Attorney General should turn about face and decide that under the law he was bound to present testimony on behalf of the State Highway Commissioner to disclose any benefits which might arise to Appellant's lands by the construction and operation of the railroad? Appellant would have no further remedy, because our State Supreme Court of

Michigan has held that the Highway Condemnation Act has been properly applied for the taking of Appellant's property in this instance.

Notwithstanding the broad statement of Mr. Clardy before this Court that benefits would not be deducted from Appellant's damages, we submit that the testimony of his experts discloses that benefits have been considered by them. The witness gave his opinion as to the value of the remaining property, per acre, before the taking. Then he gave his opinion as to the value of the remaining property, per acre, after the taking, which in his opinion was the same figure as before the taking. Upon cross examination the witness stated that his first valuation was based upon the use of the property for *residential purposes.* The witness further stated that his valuation, fixed upon the property after the taking, was based upon its value for *Industrial or business uses, which would arise after the construction and operation of the railroad.* Then finally the witness was asked what in his opinion the depreciation of the property for *residential purposes* would be as a result of the relocation of the railroad. To this question he answered, approximately 33 1-3 per cent depreciation.

It is obvious from these statements, that the witness based his valuation on the property, *for residential use,* before the taking, and *upon industrial use,* after the taking. He therefore considered the benefits, arising from the construction and operation of the railroad, in fixing the damages.

Although the Attorney General insists that he is not asking the Commissioners to deduct benefits from the award, we submit that the above rule which he is applying, clearly indicates that his witness considered bene-

fits, and that the opinion of the witness in fixing the damages, took into consideration such benefits. Therefore, there is now testimony, in the record before the Commissioners, which testimony was introduced by the Attorney General, and is based upon benefits which were considered by the witness.

Although the Attorney General insisted before this Court that he is not asking the Commissioners to deduct benefits from Appellant's award, we submit that the above rule which he is applying clearly establishes the fact that benefits were considered by his witness, and that the opinion of his witness was based upon the consideration of such benefits.

Under the Railway Condemnation Act, such testimony would be clearly incompetent, and the Court would strike it from the record, but under the Highway Condemnation Act, and the rule applied by the Attorney General, such testimony is competent, and in that way the benefits are being considered, and the Court Commissioners will base their award upon the testimony introduced, and Appellant's award will be diminished thereby, although the word "benefit" may at no time be used or alluded to, by the witness or by the Attorney General. Regardless of what these benefits may be termed by the Attorney General, or the State Highway Commissioner, the expert testimony introduced by them, is based upon the consideration of such benefits, and we submit, therefore, that Appellant has been in that way denied the right of excluding such testimony, although it would have been excluded in proceedings under the Railway Condemnation Act, and could not have been considered by a jury making the award in such case.

The law is established beyond question in the State of Michigan, that under the Railway Condemnation Act, the tribunal assessing the damages, can not consider benefits arising to the remainder of residential property where a part of it is taken, by reason of the adaptability of such property for commercial or business purposes brought about by reason of the presence or proximity of the railroad.

No testimony tending to establish such a change in character of the property from residential use to industrial or business use, is competent evidence, and such testimony is always excluded.

In the case of *Plantanga versus Railway Company*, 190 Michigan, 661, the Supreme Court of Michigan carefully considered the charge of the court below to the jury, in applying the measure of damages provided for under the Railway Condemnation Act, which charge read as follows:

> "'the only question of fact,' the court told the jury, 'for you to consider, is whether the building and operation of this side track depreciated the value of the plaintiff's property for residence purposes'."

Again the jury was told:

> "'The question is, if that property had any value for residence purposes before the track was built, has that value been reduced by a proper operation of this side track in the usual way? * * * You are not authorized or permitted to take into consideration the use of the property for any other purposes except for rental purposes, rental *residence purposes*, and to what extent the building of the road depreciated the value of that property for those purposes; that is, you are not to take into consideration the value of the property for factory purposes'."

The Supreme Court affirmed the above charge of the of the court below, although the defendants strenuously insisted that the rule was too narrow, "since it prevented them from showing that the presence of the road in the street added materially to the actual selling value of the property *for purposes other than residence.*"

Although the above case was an action at law for damages, the Court stated that the rule of damages applicable to the Railway Condemnation Act, was properly applied. Of course there had formerly been no proceedings started to assess Plaintiff's damage in that case, which would bar an action at law for recovery, such as Appellant is confronted with in this case. That is, the condemnation of Appellant's land under the Highway Act will prevent any further recovery.

The attitude of the Appellee Railway Company and the Nelson Company, who are assisting the State in the Condemnation proceedings by authority of a provision in the contract contained in Section Ten of Act 340 of the Public Acts of 1927, is that benefits arising by the construction and operation of the railroad, are proper to be considered and deducted from the award. They say in answer to Appellant's Bill of Complaint (Paragraph Six):

> "* * * that the natural and reasonably to be expected development thereof will be for industrial purposes, and that the value of the remainder of the tract of land *after the construction and operation of a railroad* on the land taken in the condemnation proceedings, as hereinabove provided, *will be equal to, or in excess of the value of said remainder before the taking*" (Record, page 63).

A portion of paragraph seven of their Answer reads as follows:

> "7. Answering paragraph seven of the bill of complaint, these defendants neither admit nor deny the contents thereof, but leave plaintiff to his proof, except that they deny that the value of plaintiff's land will be diminished in the amount therein alleged, *or in any amount, but allege that the value will, in fact, be increased*" (Record, page 63).

The last part of paragraph ten of their Answer reads as follows:

> "These defendants further deny that it is material to the issues of this cause whether plaintiff would be otherwise entitled to be awarded other damages under the laws of the State of Michigan were his land being taken by a railroad company in the State of Michigan for railroad purposes" (Record, page 65).

We find the following statement on page 9 and 10 of the brief of Appellees Railway Company and Nelson Company filed herein:

> "* * * The evidence before the Court Commissioners to date is to the effect that the balance of his land *will not be depreciated in value, but will in fact be benefitted.*"

On page 44 of their brief, we find this statement:

> *"Whether benefits shall be offset or not is a matter of procedure and not a fundamental right."*

The attitude of the Appellee Railway Company in regard to deducting benefits from Appellant's damages, is clearly expressed on page 42 of the brief filed in its

behalf, by its counsel. We find there the following statement:

> "The most that can be argued for plaintiff is that it is not just or equitable to *offset benefits against the damages that would otherwise be payable as compensation for the taking of portions of his property,* but this is an argument to be addressed to the Legislature and not to the Courts, and the fact that the Legislature has seen fit in the railroad condemnation law not to authorize the offsetting of benefits does not mean that the plaintiff, or others similarly situated, has been, or will be, denied any fundamental right. *The railroad condemnation laws merely grant to property owners certain privileges which they are not constitutionally entitled to.* The highway condemnation law limits property owners more nearly to their constitutional rights, but it gives to *all* property owners all of the rights guaranteed by the constitution."

In view of the above language, and also in view of the fact that the railroad company is bound to repay the State all of the money expended in the acquisition of the new right of way, we should and must assume that the railway company will exhaust every effort in attempting to deduct benefits from Appellant's damages, which task it will undoubtedly accomplish under the Highway Condemnation Act.

On pages 56 and 57 of the brief of the above Appellees filed herein, we find the following statement:

> "The general highway condemnation law as applied to plaintiff's case does not deprive the plaintiff of any fundamental rights, privileges or immunities, but merely means that the plaintiff *will not be permitted to make as much of a monitary profit out of the proposed improvement as he would otherwise hope to get.*"

The language in the above quotations shows beyond a doubt, we believe, that the Appellee Railway Company intends to produce testimony before the Court Commissioners, to show that there will be benefits arising to appellant's property by reason of the construction and operation of the railroad. We also think that it shows very clearly that said appellees intend to urge the Commissioners to deduct benefits arising from the construction and operation of the railroad, from appellant's award. The statement of the Attorney General that *he* would not insist upon the deduction of benefits would in no way bind the action of the Railway Company in this case. In fact, testimony showing that in the future the Railway Company intends to operate fast interurban service between the cities of Detroit and Pontiac, has been placed before the Commissioners, to influence them in this regard, and they will evidently consider this to be a great benefit to appellant when fixing the award, although such benefit is speculative and impossible.

A portion of paragraph 8 (a), of the contract entered into between the State and the Railway Company, embodied in Section Ten of Act 340, of the Public Acts of 1927, reads as follows:

> "No purchases shall be made, except on the joint approval, in writing, of said State Highway Commissioner and Chief Engineer (of the Railway Company) and should either disapprove of the price of any proposed purchase, then the same shall not be concluded, but the land therein involved shall be acquired by condemnation. When condemnation is necessary, proceedings therefor shall be instituted and conducted on behalf of the State, by its proper officers, *but with the right in the railway company, through its attorney or attorneys, and other representatives, to participate in such proceedings.*"

By the above authority, the Railway Company has the right to enter into the proceedings and produce any testimony before the Court Commissioners which it deems necessary for the appraisal of appellant's property. The Attorney General in no way may limit or control the testimony which the Railway Company desires to introduce for the purpose of showing benefits, to be considered in offsetting appellant's damages by the Commissioners.

Nowhere in the brief of Appellee Railway Company has it stated, or even intimated, that it does not desire to deduct benefits from appellant's damages, or that benefits cannot be deducted under the present proceedings. It has formerly strenuously insisted that it has the right to require the Court Commissioners to deduct any benefits arising from the construction and operation of the railroad, from appellant's damages, and we believe that the Railway Company's brief, discloses that it takes the same attitude or position before this Court. The statements of Mr. Clardy, to the effect that the Highway Commissioner would not insist upon deducting benefits, could not and did not bind the railway company in any way, as the railway company appeared before this Court, represented by its own counsel, and not by the Attorney General or his assistant, Mr. Clardy.

The test in this case in determining as to whether or not Appellant is being denied the equal protection of the laws, is not dependent upon what the Attorney General and State Highway Commissioner *say* they will do in connection with the deduction of benefits, but on the contrary, the test is what they, together with the Railway Company, are doing, and what they have power to do in the future, proceeding under the Highway Condemnation Act. It has been held by a unani-

mous line of authorities that in considering the application of the Equality Clause of the Fourteenth Amendment, we are not to be governed by what a State Agency *might* do, but rather by what it *could* do, and what it is *attempting* and *threatening* to do, under an arbitrary power of discrimination, given by statute, so that certain persons will be denied the equal protection of the uniform laws.

Yick Wo vs. Hopkins, 118 U. S., 356.

We submit that the Appellees are now seeking to deduct benefits, from Appellants' award, and that they will so continue that policy in the future, and we further submit that the Highway Act allows such procedure and for that reason Appellant is now being denied, and that he will in the future be denied, the equal protection of the laws, contrary to the Fourteenth Amendment to the Federal Constitution.

BROWN VS. UNITED STATES, 263 U. S. 78, IS NOT IN POINT UPON ANY QUESTION RAISED IN THIS CAUSE.

The provisions of Act 340 of the laws of 1927 delegated to the State of Michigan through a State Agency, the power to condemn a right of way for the railway company, without taking from the Railway Company its right to also condemn a right of way.

Appellees contend that by virtue of the holding in the Brown case, the Highway Commissioner has power to condemn regardless of the fact that Appellant is deprived of his procedural rights, his fee simple title, and his right to damages that he would otherwise enjoy if the condemnation were being prosecuted under the Railway Act.

In the Brown Case the Court held THERE WAS NO OTHER AVAILABLE PRACTICAL MEANS by which a new site for three-quarters of the town could be attained adjacent to the one-quarter remaining and held the taking to be for public use.

No such situation confronted the State prior to the enactment of Act 340. The State Highway Commissioner could have condemned the railway right of way for highway use over the distance of five and one-half miles. The Railway Company, in turn, could have condemned a new right of way under the Railway Act. Both of these were *available practical means* for completing the project which the contracting parties could have utilized without question.

The only question raised by the land owner in the Brown Case was whether the respondents' property could be taken in that manner for public use. No objection to the procedure was raised on the ground that it offended the Equality Clause of the Fourteenth Amendment to our Constitution, and none was raised on the ground that the *procedure* was without due process of law. In fact, it could not be claimed that the Federal Act was offensive to the Equality Clause of our Fourteenth Amendment, because that amendment is limited to the inequality of State Laws.

APPELLANT IS LOSING THE ABSOLUTE FEE SIMPLE TITLE TO HIS PROPERTY, WHILE ONLY AN EASEMENT COULD BE ACQUIRED BY APPELLEES UNDER THE RAILWAY CONDEMNATION ACT.

The Highway Condemnation Act provides that the fee simple title to land may be taken, under the provisions of that Act. The Assistant Attorney General,

in his argument before this Court, admitted that the fee simple title is being taken from Appellant in this case. He also, in his argument, conceded that the fee simple title could not be acquired by condemnation under the Railway Condemnation Act. He further admitted that a railroad and not a highway, is now being constructed through and upon Appellant's land here involved.

Appellant, therefore, contends to this Court, that the taking of the fee simple title from him, by the State Highway Commissioner, for the purpose of immediately conveying said title to the railway company in fee, denies to the Appellant the equal protection of the laws and deprives him of his property without due process of the law, contrary to the Fourteenth Amendment to the Federal Constitution. In no other case in the State of Michigan has the property owner ever been compelled to surrender the fee simple title to his land, to be used for railway purposes.

Under the laws of the State of Michigan, it would be impossible to condemn the fee simple title to any other land to be devoted to railway uses. Appellant is forced by the proceedings under the Highway Condemnation Act to surrender a greater interest in his property than any other person could be compelled to surrender for railway use.

The fact that the State is taking a fee simple title from Appellant, by virtue of the Highway Condemnation Act, and deeding it, without restrictions, to the railway company, makes it possible for the railway company at any future date to impose any additional servitude outside of railway uses which it may see fit, upon the land taken from Appellant, and to put the land to

any use or to sell or lease it to any other person, for any other use or purpose, without any regard to the consequential damages which may be inflicted upon the remainder of Appellant's tract, and without any remedy on Appellant's part to prevent it from so doing. Such an injustice could not be accomplished if the land were taken under the Railway Act, and only an easement acquired.

In *Board of Health vs. Vanhosen,* 87 Mich. 533, at page 539 of the opinion, which is an early case, our Michigan Supreme Court adopted the rule that where an easement only was taken the railway company could not dispose of the same to private shippers. In so holding our Michigan Supreme Court spoke as follows:

> "It has been held that condemnation proceedings cannot be resorted to, to take lands for the construction of spur tracks which are made for the accommodation of individual shippers." In re *Railway Company,* 108 New York, 375. In re *Railroad Company,* 110 New York, 119; *Railroad Company vs. Wiltsz,* 116 Ill., 449; *Railroad Company vs. Iron Works,* 31 West Va., 710.

The foregoing rule has been consistenly followed in Michigan where only an easement was taken under the Michigan Railway Condemnation Act.

On the other hand, where the title in fee is taken, it is established beyond peradventure that the railroad may make whatever use it may desire of the land.

In Volume 2, Lewis on Eminent Domain, p. 1497, Sec. 58, the following appears:

> "But where a fee is taken for railroad purposes, the authorities hold that the company may dispose of the land as it sees fit, as against any private person."

The foregoing text is supported by a long line of authorities, among which are the following:

Curry vs. New York Transit Company, 66 N. J. Equity 313;

Eldridge vs. City of Binghampton, 120 N. Y. 309;

Calcasieu Lumber Company vs. Harris, 77 Tex. 88;

Anderson vs. Atlantic Coast Line, 59 S. C. 350;

Chamberlain vs. Northwestern Railroad Co., 41 S. C. 399;

Pittsburgh Railway Company vs. Garlick, 20 Ohio (C. C.) (Old) 561;

Spierling vs. Ohl, 232 Ill. 581;

Coin vs. Warriou Southern Railway, 137 Southern Ala. 553.

According to maps filed in the public records of the State Highway Department, a strip of land three hundred feet wide is being taken by the State through Appellant's property. A part of this strip, one hundred feet wide, is to be used in the building of tracks, and the remaining strip, two hundred feet wide, is to be ostensibly used in part by private shippers for sidings. After the fee to this property is taken, the railway company may, and in all probability will, sell a part of this land to private shippers for their sidings, if, and when, it has the opportunity to do so.

JOHNSTONE VS. RAILWAY, 245 MICH., 65, DISTINGUISHED

The holding of our Michigan Supreme Court in the Johnstone case is not controlling of any question involved in this case. None of the Plaintiff's lands were being actually taken by the State in that procedure. Johnstone's unsevered unit was approximately sixty feet away from the line of the proposed right of way, and was located in a highly restricted subdivision. The Court merely held that inasmuch as it was an equity case in which the Plaintiff prayed for an injunction to restrain the breaking of the restrictions, a procedure would be prescribed whereby damages to Johnstone's easement could be adjudicated and determined.

Because of the peculiar nature of the damages sought the Court merely laid down a different rule fixing the measure of the damages than that applied in both railway and highway condemnation.

The Court merely announced on page 83 the rule applicable to a railway taking, and the rule applicable to a highway taking. Both are in strict accordance with the established law of Michigan. Then the Court said: The Plaintiffs (meaning Johnstone and the Plaintiff in another case similar) were entitled to the application of another measure of damages entirely distinct from that involved in the case at bar.

It was not claimed in the Johnstone case that either the due process clause or the Equality Clause of the Fourteenth Amendment to the Constitution of the United States was being offended, and the Court did not pass upon those questions.

FITZSIMONS & GALVIN VS. ROGERS, 243 MICH., 645, DECIDED NONE OF THE QUESTIONS HERE RAISED.

In the Fitzsimons & Galvin case the Court held as follows:

> "But it does not follow from this that in a proceeding where the State Highway Commissioner is seeking to secure a right of way, the damages to be awarded the property owner will be anything short of 'just compensation' provided in Section 2 of Article 13 of the Constitution."

It will appear from the above that the only question raised by the Plaintiff in that case bearing upon probable damage award was "just conmpensation." It was not contended by the Plaintiff that Act 352 of the Public Acts of 1925, as amended, offended the Equality Clause of the Fourteenth Amendment to our Federal Constitution, and a review of the opinion discloses that the Court did not undertake at all to apply the equality test in determining the constitutionality of the Act.

The question of taking fee simple title from the owner instead of the ordinary railway right of way easement was not raised; neither was the question of jurisdiction of a Highway Tribunal to adjudicate damages for lands to be used as a railway right of way.

No question of consequential damages or deductions of benefits were raised.

Also the Court erroneously assumed that the State Highway Commissioner was proceeding under the State Agencies Act (one in every respect similar to our Railway Condemnation Act), instead of the Highway Act.

In the Fitzsimons & Galvin case the Plaintiff questioned only the Highway Commissioner's acts in making determination of necessity, no question of measure of damages being involved. The suit was brought after the date on which necessity was determined and before the Highway Commissioner filed the petition for the creation of a Highway Three Man Tribunal to determine compensation and pass title in fee.

Plaintiffs also upon hearing *waived the question of necessity,* therefore, none of the issues raised here in Appellant's case were raised in the Michigan Supreme Court in the Fitzsimons & Galvin case.

The comment of the Court to the effect that the damages awarded to the owner would not be less than "just compensation" is of no significance because that question is not involved in this suit.

"JUST COMPENSATION" IS NOT AN ISSUE IN THIS CASE

The term "just compensation" has no relation to the question of either arbitrary classification, or the question of equal protection of the laws.

Appellees, under this heading, vigorously contend that although Appellant may lose his right to a proper award of damages, and lose valuable procedural rights allowed to all other persons under similar circumstances, nevertheless, Appellant will be awarded "just compensation," and therefore he cannot complain. Both briefs of Appellees cite numerous authorities in support of this contention, all of which bear solely and alone upon the question of "just compensation." They have nothing bearing upon the question of arbitrary discrimination, applying to compensation of different parties in

similar circumstances. The term "just compensation" is flexible, and may be interpreted and applied by the State Court to produce any result desired in regard to damages. That provision in the State Constitution may be satisfied, although benefits be deducted in this case, while such benefits are not deducted in any other case where property is taken to be devoted to railway use.

Appellant complains here, that he is not getting *equal compensation,* or compensation equal to that which the law requires to be paid in all other cases where property is taken for railway use, because benefits are being deducted from his damages, while allowed to all other persons within the State under similar circumstances. In this way Appellant claims that the State is denying to him the equal protection of the laws contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

UNREASONABLE CLASSIFICATION

The general Railway Compensation Law automatically places all owners of real estate, destined to be taken for railway use, in a general class. This class is just as general in character as the railway law itself. All members of that class are entitled to remain in it, enjoying the equal protection which our Constitution guarantees.

This general Railway Law likewise places all railway companies in a general class, the outlines of which, are just as fixed and definite as those bounding the property owners' general class. The railways are jealous of their membership in this general class, and justly so. Often times their very existence depends upon it.

When some of the railroads of the general class are separated from it and placed in a special class by arbi-

trary legislation, they complain bitterly and seek relief from our Courts. The property owner of the general class does likewise when he finds himself similarly transposed. Each general class is afforded the same measure of protection against unreasonable classification by our Courts.

When a property owner, removed from the general class to a special class, by legislation, enjoys a higher degree of monetary reward in a railroad condemnation suit than those owners of the general class could enjoy when similarly situated, then the railroad is being discriminated against and has been placed arbitrarily in a discriminate class. The reverse of this is also true. What the property owner unjustly gains, the railroad must unjustly lose, and what the railroad unjustly gains, the owner must unjustly lose.

The Detroit, Grand Haven & Milwaukee Railway Company is seeking to enjoy advantages, immunities and privileges that no other railroad company could possibly enjoy in Michigan, because advantages, privileges and immunities are being denied Appellant and others, in his special class, that are denied to none of the general class of property owners similarly situated.

The privileges and immunities afforded the Appellee Railway Company in the contract, and Act 340, of 1927, could never be extended to any other railway in Michigan without other special legislative enactment of similar character. Likewise no other special class, similar to that in which Appellant has been placed, could be created without other special legislation. It necessarily follows that there can be no valid claim of a justifiable basis for this sort of classification.

RAILWAY COMPANY'S AUTHORITY TO CONDEMN APPELLANT'S LANDS

The authority of the Railway Company to initiate condemnation proceedings under the general Railway Act is in no way curtailed or abrogated by Act 340 of 1927, nor by the agreement contained in it. If this Court should hold the laws complained of unconstitutional, and restrain the prosecution of the proceedings now pending before the Highway Commissioners, the Railway Company would immediately institute a similar proceeding under the Railway Act. The Circuit Judge before whom the railway petition would be filed may order a jury struck forthwith and no obstacle would interfere with the early determination of the respective rights of the parties in a tribunal of competent jurisdiction. Appellant would then receive all rights, to which he is entitled, under the Railway Act, both as to procedure, and as to the measure of damages, and there could be no discrimination against him.

APPELLANT HAS NO ADEQUATE REMEDY AT LAW

Appellees, in their briefs, have dwelt at length upon the argument that Appellant has an adequate remedy at law, and, therefore, he has no standing before this Court. We can see no merit in this argument. In the first place, it would be impossible to review the award of the Court Commissioners until title would have been taken by the State and deeded in fee to the Railway Company. Thereafter the Railway Company could convey, mortgage, or appropriate the property as it saw fit. In case the Supreme Court, or more probably this Court, found the proceedings to take the property to

be unconstitutional, then Appellant would be required to institute a multiplicity of suits, and bring into Court all subsequent owners, in order to recover title to his property, which, if not impossible, would be extremely difficult.

In the case of *Johnstone vs. Railway Company*, 245 Mich., 65, our Court established beyond question, that the measure of damages allowed under the Highway Condemnation Act would be applied in this proceeding. The Court said:

> "The benefits arising by reason of the construction and operation of the railroad are proper to be considered * * *."

This is the rule applied under the Highway Condemnation Act. The rule under the Railway Act prohibits consideration of any benefits at all.

Meanwhile, Appellees have been, and are now, upon Appellant's property, digging and terracing the land for the purpose of constructing a railroad thereupon, and they are thereby causing great, immediate, continuing and irreparable injury to this Appellant's property. Appellant came into the Federal Court of Equity because he had no adequate remedy in a State Court of law. He desired to stop further injury to his land and to preserve his rights guaranteed by the Fourteenth Amendment to the Federal Constitution, which were being violated under color of State sanction.

It was settled for all time by this Court in the case of *Ex Parte Young*, 209 U. S., 123, that a person seeking relief, need not pursue his remedy in the State Courts while his Federal Constitutional rights are being infringed by operation of a State law, but on the contrary, he may institute proceedings in a Federal

Court of Equity immediately in order to restrain the operation of the statute. It was claimed in that case that the property owner was bound to pursue his remedy in the State Courts under the State laws, before he would have any right to come into a Federal Court of Equity. In answer to that contention, this Court spoke as follows:

> "If, however, he should do so, while the Company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid the property of the Company would have been taken during that time without due process of law, and there would be no possibility of its recovery" (p. 163).

The Court in the above case emphatically upheld its jurisdiction over the case presented. We think that rule should be applied in this case.

Appellant could not appeal from the determination of necessity, or the award of damages by statutory writ of certiorari as provided for in the Highway Act without recognizing the constitutionality of the Act. The only practical available procedure by which he could obtain a review of the constitutionality of the Act, and raise the due process and equality clauses of the Fourteenth Amendment to the Federal Constitution was by waiting until the Highway Commissioner initiated the portion of the proceedings that would result in the appointment of a Highway Tribunal that would undertake to award damages and take his title in fee.

Under the railroad law both necessity and compensation are determined by the jury in one proceeding, but under this new highway law a Commissioner was

authorized to determine necessity by himself in one distinct proceeding, and to have compensation determined before three Commissioners in another distinct proceeding.

Appellant could raise the constitutionality of both proceedings in the one action only by following the procedure employed in this suit.

Furthermore, this suit enables Appellant to test the Federal constitutionality by bill in Chancery in the Federal Court whereas an interlocutory injunction may not be obtained, pending a proceeding under the common law writ of certiorari.

Inasmuch as the State of Michigan is a sovereign State, and has never consented to be sued, Appellant cannot recover damages from it for the taking and destruction of his property, in case the statutes and proceedings applied are later found to be unconstitutional; and Appellant would have no way of recovering such damages from the Railway Company, because the property is being taken in the first instance by the State of Michigan, and the Railway Company has no contractural obligations or relations with Appellant.

We, therefore, submit that the Court below erred in dismissing Appellant's Bill of Complaint, and in denying Appellant's Motion for an Interlocutory Injunction.

Respectfully submitted,

FRANK H. DOHANY,
Appellant pro se.

Dated: Detroit, Michigan,
March 17th, 1930.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1929

No. 338

FRANK H. DOHANY,
Plaintiff and Appellant,

v.

FRANK F. ROGERS, et al,
Defendants and Appellees.

BRIEF OF DEFENDANT, FRANK F. ROGERS

WILBER M. BRUCKER,
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Lansing, Michigan.

FRANKLIN DeKLEINE COMPANY, PRINTERS AND BINDERS, LANSING

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1929

No. 338

FRANK H. DOHANY,
Plaintiff and Appellant,

vs.

FRANK F. ROGERS, State Highway Commissioner of the State of Michigan; THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY, a Michigan Corporation, and THE H. W. NELSON COMPANY, of Chicago, Illinois, a foreign corporation,
Defendants and Appellees.

BRIEF FOR DEFENDANT FRANK F. ROGERS

STATEMENT OF FACTS

The statement of facts embodied in the appellant's brief is not complete nor entirely accurate. We therefore deem it advisable to present a statement of the facts.

This controversy arises out of the widening of a state trunk line highway by the Highway Department of the State of Michigan. The State emphasizes this important

fact because the appellant has predicated his entire argument upon a conclusion wholly at variance with this one controlling fact in the case. A clear understanding of the various statutes involved and of the legal position of both appellant and defendants can only be had, we believe, through a review of the history and background of this highway project.

Woodward Avenue, the state trunk line highway whose improvement by the State of Michigan has created the problems presented in this case, is perhaps the most important and heavily traveled highway leading out of the fast growing city of Detroit. This important artery starts at the river front which marks the southern boundary of Detroit, and goes diagonally in a general northerly direction through the heart of the city, and on through the counties to the north. The part of this highway which the State highway department is developing begins at the north city limits of Detroit and extends northerly for some nine and one-half miles through a densely populated area. The metropolitan area so served includes the city of Pontiac and a number of smaller residence communities. In this way Woodward Avenue carries a tremendous amount of traffic. Traffic counts demonstrate that this is one of the most heavily traveled highways in the whole United States.

More than ten years ago, the need for widening this highway was brought to the attention of the State. In 1921 the various communities most directly affected passed resolutions and began an active campaign to secure the greatly needed traffic relief. The problem was greatly complicated by the fact that the tracks and embankment of the co-defendant, the Detroit, Grand Haven and Milwaukee Railway Company, occupied sev-

eral miles of the land necessary for the widening of the highway. It was apparent that unless the State could acquire the railroad right of way immediately adjacent to Woodward Avenue the highway improvement could not be made in a satisfactory manner. In 1925, the Michigan State Legislature enacted a statute, which in the words of its title, was "An Act to authorize and empower the state highway commissioner to purchase or condemn property to exchange for the right of way, or a part thereof, of railroads, and railways, when such right of way, or part thereof, is necessary to be acquired for widening, straightening, altering or otherwise improving a trunk line highway, and to make such exchange." [Title to Act 215 Public Acts of Michigan 1925].

In the same year the Legislature enacted a highway condemnation statute which contained a section authorizing the State Highway Commissioner to acquire property to be exchanged for other property whenever such other property was actually needed for highway purposes, and an agreement had been made for the exchange. [Act 352 Public Acts of Michigan 1925]. Pursuant to the authority conferred upon the commissioner by these two acts, a contract was entered into with the railroad company whereby the state undertook to procure a new right of way which was to be exchanged for that part of the old right of way needed for the improvement of Woodward Avenue. In 1927 the Legislature enacted a statute which set forth in its entirety the sort of contract it desired the state to enter into with the railroad company for this exchange. [Act No. 340 of the Public Acts of Michigan 1927]. The contract theretofore entered into between the State and the railroad company was thereafter, in July, 1927, set aside and supplanted

by the new contract authorized by this last act of the Legislature. The general provisions of this act are substantially the same as those contained in the first contract.

The State thereafter proceeded to purchase lands needed for the new right of way to be exchanged for the old. Considerable progress was made in acquiring the property in this manner but it soon became apparent that in some instances it would be necessary to institute condemnation proceedings. (Incidentally it should be stated that at this time the State has succeeded in securing by purchase all of the lands necessary for this re-location project, except that owned by this appellant and his relatives and a few other small parcels. In other words, almost all of the nine and one-half miles have been secured without resort to condemnation).

In April, 1928, the State Highway Commissioner conducted a hearing strictly in accordance with the highway condemnation statute referred to above (Act 352 P. A. 1925), to determine the necessity for the project and for the taking of the particular lands involved. His determination of necessity was duly made and filed April 19, 1928, and the important parts thereof, so far as the appellant is concerned, are set forth in his bill of complaint. (R. p. 7) Certain others involved sued out a writ of certiorari in the State Supreme Court and the Commissioners' Determination of Necessity and the constitutionality of the act authorizing the contract between the railway and the state was attacked. The principle question involved in the instant case was most strenuously pressed in that case. It was there argued that the highway commissioner should not condemn the property under the provisions of the highway condemnation stat-

ute above referred to, but that he should use the condemnation statutes ordinarily employed by railroads. This case is entitled Fitzsimmons & Galvin, Inc. v. Rogers, 243 Mich. 649. The opinion in that case will reveal that the contentions of the state were upheld in every particular, and the constitutionality of the statute and procedure was sustained. At the same time that case was before the State Supreme Court, the appellant herein also filed with the State Supreme Court a petition for a writ of certiorari. This was later withdrawn by the appellant.

After that decision by the State Supreme Court in the case above named, a great many cases were instituted in the circuit courts for the counties of Oakland and Wayne, involving new points. Two of them were consolidated and taken to the State Supreme Court. The opinion in those two cases is reported in the case of Johnstone, et al v. Detroit, Grand Haven & Milwaukee Railway Company, 245 Mich. 65. The problem there had to do with the right of lot owners in a restricted subdivision touched by the relocation project, but whose lots were not actually invaded, to recover damages for the violation of the restrictions. We mention this case because the pronouncements of our Supreme Court, both in the opinion and in the decree settled in that case, interpreted the state statutes involved in this case and because the purpose of the project was stressed.

About the time this last case was decided by the State Supreme Court, this appellant and two other plaintiffs initiated actions in the United States District Court, Eastern District of Michigan, Southern Division, in Equity. This defendant filed an answer and a motion to dismiss in each of the three cases and a hearing was duly

had before the statutory three-judge court. The construction on the entire project was held up by a restraining order during the time the cases were before the lower court. The dismissal of the bills of complaint and the lifting of a restraining order was ordered in the opinion written by Judge Tuttle, and concurred in by Judges Moinet and Hickenlooper.

Since the filing of the bill by the appellant, the defendant, Frank F. Rogers, has ceased to be State Highway Commissioner, having resigned on January 1, 1929. Another was appointed to fill the vacancy at that time and that man has now been duly elected for a full term. At the time the opinion was rendered by the lower court, therefore, the defendant, Frank F. Rogers, was not the State Highway Commissioner and did not represent the State of Michigan.

There has likewise been a change, in so far as the railroad is concerned, due to a consolidation which has been completed since the filing of the bill.

ARGUMENT

SUMMARY OF ARGUMENT

I.

THE STATUTORY TRIBUNAL BELOW HAD JURISDICTION TO DISMISS THE CAUSE AND THE DECREE HAS BEEN PROPERLY MADE AND ENTERED.

II.

EQUAL PROTECTION OF THE LAWS; ITS MEANING AND APPLICATION TO THIS CASE.

III.

THE MAIN ISSUE IS WHETHER THIS PROPERTY IS BEING TAKEN FOR RAILROAD PURPOSES OR FOR HIGHWAY PURPOSES.

A. *All of the claimed errors arise from the contention that this property is being acquired for railroad purposes and that the railroad condemnation statute is not being used. It is obvious that if the property is being taken for highway purposes the use of the highway statute is proper.*

IV.

THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION IS NOT BEING VIOLATED BY THE STATE'S ACQUIREMENT OF THE PLAINTIFF'S PROPERTY THROUGH THE USE OF OUR HIGHWAY CONDEMNATION STATUTES.

A. *The lower court's decision holding that plaintiff's property is being properly acquired for a highway purpose under the State Highway condemnation statute is in accord with the decisions of this court and state courts.*

1. Property acquired as substitute to be traded for that part of the present right of way of a railroad needed for the widening of a public highway is acquired for highway purposes as distinguished from railroad purposes.

Brown v. United States, 263 U. S. 78;
Pitznogle v. Western Maryland Railroad Co., 119 Md. 673, 87 Atl. 917;
Rogers v. Bradshaw, 20 Johnson (N. Y.) 735;
Fitzsimmons & Galvin Inc. v. Rogers, 243 Mich. 649.

2. Michigan Supreme Court has held this to be a taking for highway purposes.

3. Other courts have agreed with state's position.

4. Different highway uses will vary the elements and amount of damages but will not change the legal character of that use.

5. The state highway commissioner possesses authority to acquire lands to be traded to a railroad for a new right of way where part of the old line is needed for the widening of a public highway.

Sec. 23—Michigan State Statute, Act 352 Public Acts 1925 (Set forth fully in appendix)
Sec. 1—Michigan State Statute, Act 215 P. A. 1925.
Fitzsimmons & Galvin Inc. v. Rogers, 243 Mich. 649;
Johnstone, et al v. D. G. H. & M., 245 Mich. 65.

B. *The Michigan State Supreme Court has held that this property should be acquired under the provisions of the highway condemnation statute.*

Fitzsimmons & Galvin Inc. v. Rogers, 243 Mich. 649; Johnstone, et al v. D. G. H. & M. Ry. Co., 245 Mich. 65.

C. *The Michigan State Supreme Court has held that the State has observed all the statutory requirements and that due process of law has been accorded appellants.*

Fitzsimmons & Galvin Inc. v. Rogers, 243 Mich. 649; Johnstone, et al v. D. G. H. & M. Ry. Co., 245 Mich. 65.

D. *Interpretation of our state statutes by our Supreme Court is binding upon Federal Courts.*

1. The construction and constitutionality of state statutes by a State Supreme Court will govern the Federal Courts.

27 R. C. L. 44, 46;
West v. Louisiana, 194 U. S. 258, 48 L. ed. 965; 6 R. C. L. 85, 87;
Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112; 41 L. ed. 369;
General American Tank Car Corp. v. Day, 270 U. S. 367, 70 L. ed. 635;
Ashe v. United States, 270 U. S. 424, 70 L. ed. 662;
Palmer v. Ohio, 248 U. S. 32, 63 L. ed. 108.

E. *Regardless of whether the property is being acquired for highway purposes or for railroad uses, a proper classification has been adopted and the use of the highway statutes in acquiring the property is justified.*

1. The Legislature has a wide range of discretion in establishing classifications.

6 R. C. L. 384.

2. A classification in eminent domain cases is based on the character of the agency seeking to take the property.

" • • • The classification (is) based on the character of the party seeking condemnation. • • ".

20 C. J. 874.

In re Valley Center Drain Dist. 64 Mont. 545, 211 Pac. 218;
Marin Municipal Water Dist. v. Marin Water & Power Co., 178 Cal. 308, 173 Pac. 469;
Munn v. Independent School Dist., 188 Ia. 757, 176 N. W. 811.
Jeffrey Manufacturing Co. v. Blagg, 235 U. S. 571, 35 Sup. Ct. 167, 59 L. ed. 364;
Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050.

F. *The provisions of the highway condemnation statute and railway condemnation statute have been found by our State Supreme Court to be substantially identical.*

Fitzsimmons & Galvin Inc. v. Rogers, 243 Mich. 649;
Johnstone, et al v. D. G. H. & M. Ry. Co., 245 Mich. 65.

V.

THE PLAINTIFF HAS AN ADEQUATE REMEDY AT LAW.

ARGUMENT

I.

THE STATUTORY TRIBUNAL BELOW HAD JURISDICTION TO DISMISS THE CAUSE AND THE DECREE HAS BEEN PROPERLY MADE AND ENTERED.

The appellant's objections that the three-judge court lacked jurisdiction to dismiss the bills and that the single judge did not possess authority to enter a decree seem to us to be conflicting and also to operate to defeat the appellant's right to appear before this court. The point was discussed by counsel and a hearing was held before District Judge Tuttle after the court had entered the decree appealed from, and counsel for the defendants were at that time convinced that the court had acted regularly and properly under the statute. When the cause came on before the lower court the court inquired as to whether or not it was desirable to consider the motion to dismiss at that time. The plaintiff suggested to the court that the motion to dismiss should be considered along with the request for an interlocutory injunction. He said at one point,—

> "I presume counsel for the defendants have the opening, your honor, on their motion to dismiss the bills and on their order to show cause too, I believe."

At the conclusion of the discussion, as to what should be done, the court used the following language,—

> "You may proceed upon the motion to dismiss."

Regardless of whether the three-judge tribunal has the power and authority to consider a motion to dismiss, it is surely true that either that tribunal or the district judge possesses that power. One or the other does possess the authority and the motion to dismiss, being properly noticed for hearing on that date, it was entirely permissible to have it considered at the same time the appellant's motion or order to show cause for an interlocutory injunction was being considered. The Federal Court in the case of Republic Acceptance Corporation v. De Land (C. D. Mich. 1921) 275 F. 632, has held that while the district court was powerless to grant an interlocutory injunction without the aid of the two other federal judges required by the statute, it nevertheless did have the power to dispose of a motion to dismiss the bill. The same court has likewise held in a case where a memorandum opinion by three judges under the section now being considered had been filed, that it was proper for the local district judge acting alone to approve a bond and to issue the injunction authorized by the opinion.

Monroe Gas, Light, etc. Co. v. Michigan Public Utilities Comm., (D. C. Mich. 1923) 292 F. 139.

It has likewise been held that where the three judges have properly held the hearing, they may delegate to the local judge the power of issuing the injunction.

Ill. Central R. Co. v. Ky. R. Co., (D. C. Ky. 1924) 1 F. (2d) 805.

The record plainly indicates that all three of the judges have concurred in writing in the decision that the interlocutory injunction should not be granted. They have likewise concurred in the decision that the bill should be

dismissed. There is no requirement in the statute which would compel the three judges to formally meet together in making their decision. They need not appear in open court and hand down the decision in that fashion. It would seem to be entirely permissible for them to agree in writing and to cause their agreement or opinion to be filed. That has been done in this case. It seems certain that the opinions filed do confer authority upon Judge Tuttle to enter the formal decree denying the interlocutory injunction and dismissing the bill. If the order was deemed insufficient and improper by the appellant, he should have mandamused the court to make and file the proper order. This court has so held in the case of Ex parte Metropolitan Water Co. of West Virginia (Kan. 1911) 31 S. Ct. 600, 602; 220 U. S. 539; 55 L. ed. 575. If the appellant's second objection is correct and if the single judge had no authority to enter a decree, then this court is without jurisdiction in the cause. A proper order has not been appealed from, and in fact there is nothing upon which an appeal can be predicated because, as the court has pointed out, this section of the Code "makes no provision for any appeal from an order of this character made by a single judge and a right of appeal is not otherwise given by statute". It is the State's position, however, that either the single judge does possess authority to entertain and decide a motion to dismiss or that the three-judge tribunal may do so, and that regardless of which may be correct, the decree entered is sufficient. There can be no dispute about the fact that if the district judge alone possesses the power, then having heard the motion brought on in a proper manner and at the proper time, Judge Tuttle was in a position to order the dismissal. If the three-judge tribunal which heard the matter possesses the power to dismiss, then the written opinions filed by the court cer-

tainly conferred authority upon Judge Tuttle to act for the entire court. So far as the interlocutory injunction is concerned, the record clearly demonstrates that the court ruled against the appellant on the order to show cause. The court did not grant the interlocutory injunction prayed for. The order entered by Judge Tuttle was done in conformity with the authority conferred upon him by the opinions filed by the judges. Of course, if the court should find that this order should have been signed by all of the members of the court, then the case cited above with regard to the necessity of mandamusing the court to make the proper order applies and the appeal is not properly brought.

Either a single judge or the special tribunal had power to entertain a motion to dismiss. Since the motion was heard simultaneously with the appellant's order to show cause for an interlocutory injunction, either the single judge or the special tribunal could have dismissed the case after the hearing. An order dismissing the cause naturally disposes of the entire matter and certainly precludes the possibility of an interlocutory injunction being granted.

II.

EQUAL PROTECTION OF THE LAWS; ITS MEANING AND APPLICATION TO THIS CASE.

Since appellant's entire case is builded on a claim of denial of the equal protection of the laws, we should first direct our inquiries toward the meaning of this clause of the Constitution. Obviously, we cannot consider all of the lights and shades of meaning that phrase may connote, but we may make some general observations, having in mind the situation which the facts in the present case disclose.

A precise definition of this phrase cannot be given. However, we find rather general agreement on the proposition that,—

> " • • it has been said that the equal protection of the laws is a pledge of the protection of equal laws, and that it means equality of opportunity to all in like circumstances."

6 R. C. L. 370.

The appellant would stretch that statement to make it mean that he is entitled to have not only similar and equal laws applied, but the same identical statute used in all other eminent domain cases when his property is being taken for the same purpose. The appellant in his brief has devoted himself almost entirely to a discussion of the differences he claims to find between the statute being employed and the one he contends should be applied. He has made the flat statement that he is entitled to have the particular statute he desires used and cites the differences between the two statutes as a reason. Although he has not made any attempt to divide his argument into the two logical divisions we believe they will fall into, his statements suggest the two following lines of reasoning:

1. That this (he says) is a railroad condemnation proceeding and, therefore, the general railroad statute he names is the only one that can be used.
2. That, granting this to be a railroad condemnation case, if any classification is proper and permissible, the facts in this case do not warrant or justify the classification adopted.

We are unable to discover whether he is presenting

the first argument or relying chiefly upon the second one. Of course, as we shall point out later on in this brief, the first ground is untenable because undoubtedly a State may classify persons or subjects and is not required to grant the use of the same statute to all the classes established.

> "State legislation does not constitute a denial of the equal protection of the laws so long as all persons subject to it are treated alike under similar circumstances and conditions in respect both to the privileges conferred and to the liabilities imposed, * * * ."

12 C. J. 1145.

The appellant carries the burden of establishing that this is legally a taking for railroad purposes and must then show that the legislature had no reasonable ground upon which to make a classification, or he will not have established a denial of the equal protection of the laws through the employment of the highway condemnation statute. Even if he should establish that this is a taking for railroad purposes (which we deny), the State legislature is certainly entitled to make a classification and to direct the employment of different statutes for different railroad purposes if the facts warrant. *Appellant cannot establish a denial of the equal protection of the laws by simply comparing the terms of one statute with another, even though both were enacted for the acquirement of property for the same general purpose if the classification the legislature has made is proper. The showing of a difference between two eminent domain statutes is of importance only after the unreasonableness of and lack of justification for the classification has been established.* A showing that the terms of one statute available for

use by a certain class differ from those of another statute used by another legislatively established class does not prove that the classification is erroneous. Such argument does not show a lack of justification or reason for the classification adopted. It need be considered only after other proof has demonstrated the lack of reason for the classification. The equal protection clause only contemplates that persons within a given class shall all be treated alike, *not that all persons shall be so treated.* Appellant has not made any showing that he is being treated any differently from all the others in his class. There is nothing in the record to warrant such a conclusion. The decisions of our own Supreme Court, to which we shall refer at length later on, demonstrate that he is being treated exactly the same as all others in the same situation. He must, therefore, show that the classification adopted in this case (if we are to speak of it in those terms at all) is unwarranted by the facts. This cannot be shown by simply saying that the terms of the statute we are using are different from those of another act which he thinks should be used. *As we view it, the equal protection clause would not prevent the establishment of a classification and the enactment of two or more statutes to be used by that class, provided that the several statutes were "equal" although not absolutely identical.* If two statutes were to be made applicable to the same class, then it would be proper to show the differences between those statutes for the purpose of demonstrating that they were not "equal" and thereby establish a denial of the equal protection of the laws.

The appellant has placed great reliance upon the case of Truax v. Corrigan, 257 U. S. 312. In that case a certain group of persons were singled out and completely

denied injunctive relief in a certain class of cases. There is no complete denial of a remedial right in the present case. Truax v. Corrigan was not a case where a special group of people were given injunctive relief by a statute which, while allowing this group to secure the desired injunction, prescribed a special form of procedure to be followed by them in securing it. Had it been of that type, there might be some comparison made between that case and the present one. In our case the appellant compares the statute the State is using with another statute he desires used and says that he is being denied the equal protection of the laws because the procedural path of one differs from the other. Our State Supreme Court has held that due process is being observed through the use of the statute we are employing, and that it will accord him just compensation. In Truax v. Corrigan there was no other statute granting injunctive relief. The plaintiff in that case raised the issue of a denial of the equal protection of the laws because of the complete denial of any such remedy.

This court in Truax v. Corrigan has said in substance that the denial of this procedural right to a certain group without any good reason for that denial is a violation of the equal protection clause. That case is not authority for the proposition that this clause is violated through the establishment of a classification which prescribes a statutory procedure which complies with due process and which the State Supreme Court has ruled is the equivalent of the statute which the appellant contends should be used.

If a reasonable classification is established there need not be a similarity in the statutes employed by the different classes. If the case should be viewed in the light

most favorable to the appellant's contentions and this should be adjudged a taking for railroad purposes, there is yet available the consideration that the classification is proper, and in addition it may appear that the two statutes are substantially identical and that they accord the appellant the same protection. On the other hand, if this is a taking for highway purposes, all questions as to classification are without force and are not applicable, because certainly the equal protection clause cannot be said to be violated when the regular highway condemnation statute is used.

III.

THE ISSUE

THE MAIN ISSUE IS WHETHER THIS PROPERTY IS BEING TAKEN FOR RAILROAD PURPOSES OR FOR HIGHWAY PURPOSES.

A. *All of the claimed errors arise from the contention that this property is being acquired for railroad purposes and that the railroad condemnation statute is not being used. It is obvious that if the property is being taken for highway purposes the use of the highway statute is proper.*

The appellant has set forth some forty-three claimed errors on the part of the lower court. There is one common basis for each and every alleged error. This foundation is the failure of the court to determine that the appellant's property is being taken for *railroad* purposes and its affirmative finding that the property is in

fact being taken for *highway* uses. *The state is taking this property for highway purposes, and in so doing, is using the regular and usual condemnation statute employed for that purpose.* Appellant contends that the property is being taken for railroad purposes and that therefore the railroad condemnation statute should be employed. It is obvious that if the lower court's finding that this property is being taken for *highway* purposes is correct, then all claims of error because of failure to use the railroad statutes must fail.

The appellant has made many claims to the effect that Act 215 of the Public Acts of 1925 is void and that the court erred in failing to so find. This act is the statute which specifically authorizes the State Highway Commissioner to acquire land to be traded to a railroad for that part of its right of way needed for the improvement of a public highway. *If the acquirement of land for the purpose of trading it to the railroad where the state has found it necessary to take part of the railroad right of way for a highway is a taking for highway purposes, then of course the use of the statute complained of does not constitute a violation of the Fourteenth Amendment.* Another allegation of error (9) raises the same point with regard to Act 340 of the Public Acts of 1927. This act is the contract in its entirety entered into between the railroad and the state under the authority conferred upon the State Highway Commissioner, by Act 215 P. A. 1925, referred to in error Number Eight.

In Error Number Ten the same claim is raised with regard to Act 352 P. A. 1925. This is the highway condemnation statute under which we have been proceeding. The rest of the allegations repeat in one form or another and in more detail the same objections that have

been set forth in the paragraphs mentioned. It will be seen that in every instance the appellant's claims of error must fail if the court is correct in its finding that the property is being taken for highway uses.

Our analysis of the arguments advanced by the appellant in his brief will disclose that if the property is being acquired for *highway* purposes as distinguished from *railroad* purposes, his case must fail, because the proper statute is being used. Appellant is not entitled to have the railroad condemnation statute used for the acquirement of property for highway purposes. When appellant argues that the highway condemnation statute deprives him of certain procedural rights he is assuming that he is having his property taken for railroad purposes and is entitled, therefore, to have a certain railroad condemnation statute applied. The same is true with regard to his claim that he is being deprived of certain substantive rights.

On page 22 of his brief, he makes the statement—"It is admitted that the State is not condemning the property for highway purposes." This statement is absolutely without foundation, and we challenge counsel to show where and when such an admission has ever been made by any of the defendants. In fact the very opposite have always been the true position. It has been the State's position from the outset that this property is being acquired for *highway* purposes and that application of the *highway* condemnation statute is not only proper, but required by the statutes involved.

The other arguments appellant advances must likewise fail if the State's contention is upheld that this is a taking for *highway* purposes. The question of classifi-

cation can only enter into the problem in the event it be proved that this is a taking for railroad purposes. Likewise, appellant's contention that the Highway Commissioner can select any one of several statutes is without force if this be a highway project, because he would be compelled to use the highway condemnation statute he is now employing if it is a taking for highway purposes. The same is true with regard to his argument that the property is not being taken for any public purpose. The argument, wherein he says that there is no necessity to take his property, stands on the same footing with the rest.

IV.

THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION IS NOT BEING VIOLATED BY THE STATE'S ACQUIREMENT OF THE PLAINTIFF'S PROPERTY THROUGH THE USE OF OUR HIGHWAY CONDEMNATION STATUTES.

A. *The lower court's decision holding that plaintiff's property is being properly acquired for a highway purpose under the State Highway condemnation statute is in accord with the decisions of this court and state courts.*

1. *Property acquired as substitute to be traded for that part of the present right of way of a railroad needed for the widening of a public highway is acquired for highway purposes as distinguished from railroad purposes.*

The sole impelling motive in this whole project has been the necessity of widening Woodward Avenue. The railroad absolutely prevents expansion as it exists alongside the present inadequate highway. Its removal must be effected before the widening project can be carried on. The removal of the tracks is an incident to and is necessitated by the highway improvement project. It has been the State's position that it had doubts as to whether it possessed the power to condemn this section of the railroad right of way. At least the difficulties attendant upon a successful acquirement in that manner were so great as to induce the Legislature to enact several statutes all designed to make possible the widening of the highway in a manner best adapted to the circumstances.

The State Legislature, recognizing that the state could not or at least should not condemn a few miles out of the heart of a great railroad and thereby suspend its operations until it could succeed in finding other property which it might not be able to acquire, resolved that the best way of solving the difficulty was to acquire a strip of land for a new right of way in its own name and then trade that strip to the railroad for that part of its right of way needed for the highway. The legislature determined that it was necessary to acquire property for this purpose which thus became a taking for a highway purpose. The State Highway Commissioner therefore employed the statute ordinarily used by him in all highway projects. Our Supreme Court, in considering the cases which have been presented to it by other property owners whose property was being taken for this project, has held that the property is being taken for highway purposes and has relied upon a decision of this court in support of its position.

"3. The plaintiff also urges that the requirements of the State for constructing this highway would have been satisfied by the mere condemnation of the present right of way of the railroad company; and since the railroad has the power to condemn land, there exists no necessity for the procurement by the State of another right of way for the railroad. In taking this position, the plaintiff overlooks the fact that the need of acquiring plaintiff's land for a new railroad right of way arose incident to and as a necessary part of the construction of a State highway, and that it is therefore within the right and power of the State under the legislative enactment, (Act No. 340, Pub. Acts 1927) to relocate the railroad."

Fitzsimmons & Galvin, Inc. v. Rogers, 243 Mich. 649.

This court has had occasion to pass upon the principal question involved in this case. Its decision in the case of Brown v. the United States, 263 U. S. 78, is controlling, and is authority for the State's position that this is a taking for highway purposes as distinguished from railroad purposes. In the Brown case the United States was condemning property for the purpose of exchanging it for other property. The property for which it was traded was to be actually devoted to the construction of an irrigation project. The property needed for the irrigation project was part of a town. Instead of condemning this town property, the United States condemned Brown's property and traded it to the persons owning property in the town. The contention was made in that case that the property upon which the new town site was to be laid out and later exchanged for the old, was not being taken for the irrigation project, but, in point of fact, for nothing more than a town site. The

further argument was then made that "the United States is without power to condemn land for the purposes of a town site under the circumstances set out in the record". The very heart of the case was founded on that major proposition. It was also contended that "under the most liberal definitions, the taking proposed could not be construed to be for a public use", *because the use to be made of the property after the exchange was the determining factor and such use was to be private.* Mr. Chief Justice Taft, in his opinion at p. 80 in the Report, tells us that this was the point involved when he said,—

> "The plaintiffs denied the power of the Congress under the Federal Constitution to condemn the land because not taken for a public use. * * The plaintiffs contend that the power of eminent domain does not extend to the taking of one man's property to sell it to another, that such an object cannot be regarded as for a public use of the property, and, without this appropriation can have no constitutional validity."

The condemnation proceeding in that case went forward under provisions of Chapter 270 of the Idaho Com. Statutes, 1919. An inspection of the Idaho statutes will reveal that they merely confer power to take for the usual public purposes, including irrigation projects. There is no authority conferred upon anyone to take property for the purpose of laying out a town site, nor is there any authority to be found for the taking of property upon which private dwellings, apartment houses and the myriad other businesses to be found within the limits of any modern city, would be placed. *The sole justification for the taking of Brown's property is to be found in the holding of the court that it was being taken directly for the irrigation project.* That was the only public purpose which could justify the exercise of the power of eminent

domain. The land taken was to be *actually physically* devoted to hundreds of different *private* uses after the government had acquired it and traded it to those owning property in the old town site. The argument presented by the plaintiffs in that case is identical with that presented by the appellant in our case. They argued that the platting of a town site and the devotion of the various fractional parts of that property to the private use of a large number of private individuals and companies after the exchange was not a taking for a *public use*, but for the private use of those to whom the property would be transferred after its acquisition. It was contended that the nature of the use to which the property was put by those to whom it was traded determined the legal nature of the taking by the government. In our case the appellant contends that the legal purpose of the taking is to be determined by the character of the individual to whom the property is traded after it has been acquired and by the use that individual makes of the property. *If this argument is valid, then in the Brown case the use for which the property was taken would have been for that of a butcher shop, a private dwelling, a factory, an office building, public streets, electrical railroads, steam railroads and a myriad of others.* Most of the uses to which the land would ultimately be devoted by those to whom it was traded would have been strictly private and could in no sense be considered public uses. The problem, as it presented itself to Mr. Chief Justice Taft, was, therefore, more difficult than that presented in our own case, because it is possible for us to say that the properties' devotion to the construction of a railroad after its transfer is nowadays considered as much a public use as that of highways. There can be no valid argument made that the property is to be used for a private purpose. This favorable circumstance, however, does not alter the fact

that the Brown case is authority for *the proposition that the taking of property to be traded to another whose land will be actually and physically devoted to a certain public purpose is as much a taking for that particular public purpose to which the land physically used is devoted, as the land actually physically used.* The land to be traded to the owners of property in the old town site and the property for which it was traded was taken for identically the same public purposes. *If that proposition were not true in all respects, there could have been no taking. There was no other public use the court could name because there was none involved.* That was precisely the contention presented to the court in that case and squarely passed upon by Mr. Chief Justice Taft. We find him saying—

"The district court held that the acquisition of the town site was so closely connected with the acquisition of the district to be flooded, and so necessary to the carrying out of the project, that the public use of the reservoir covered the taking of the town site. We concur in this view.

* * *

"*No one would say that a legislative act authorizing a railway company to build a railroad exceeds the constitutional limit by reason of a specific provision that the company may condemn land not only for the right of way, but also additional land adjacent thereto for use as borrow pits in making fills and embankments, or for use as spoil banks or dumps for the earth excavated from tunnels and cuts. Such adjacent land would certainly be devoted to the public use for which the railway was being constructed. If so, then the purchase of a town site on which to put the people and buildings of a town that have been ousted to make the bed of a reservoir would*

seem to be equally within the constitutional warrant. THE PURCHASE OF A SITE TO WHICH THE BUILDINGS OF THE TOWN CAN BE MOVED AND SALVAGED, AND THE DISPOSSESSED OWNERS BE GIVEN LOTS IN EXCHANGE FOR THEIR OLD ONES, IS A REASONABLE ADAPTATION OF PROPER MEANS TOWARD THE END OF THE PUBLIC USE TO WHICH THE RESERVOIR IS TO BE DEVOTED."

The Chief Justice made a point of the fact that the use of land for the actual laying of rails was not the only railroad purpose for which land might be taken. He pointed out that land might be taken for borrow pits or for spoil banks, and remarks that either of the latter uses would be *railroad uses,* and then says that, by analogy, the use of property, upon which to place buildings which must be removed from their location because their present site is to be used for a public purpose, is just as much a devotion to the same public purpose as the property from which the buildings were moved. He realized the force of plaintiffs' contention that the actual physical uses to be made of the property taken after the exchange was made would be largely private in nature. *He saw that if the ultimate physical use to which the property was to be devoted should govern, the taking would not be for any proper public purpose and could not, therefore, be sustained.* By the application of plain common sense, the trial court had ruled that the property was being taken for the irrigation project. Mr. Chief Justice Taft succinctly said—"We concur in this view".

In our case the highway condemnation statutes which have been applied, authorize the taking of property for a large number of uses, all of which are determined to be

highway uses. Property may be taken for the actual placement of the road itself; for the excavation of gravel, rock, sand, dirt or other materials that may be needed for the construction or maintenance of the road; *property needed to change the channel of a watercourse,* and various other uses. In addition to all those ultimate uses of land which have all been declared to be highway uses, our legislature, in the valid exercise of its power, has determined that land taken for the purpose of exchanging it for that part of railroad rights of way which are needed for the construction of a public highway is taken for highway use and supplements the highway uses enumerated in the highway condemnation statutes. *This is comparable to a taking for the purpose of diverting a stream. It permits the diverting of the course of a railroad instead of a stream.* The actual physical uses of the property in all those instances set forth in the highway condemnation statutes are all proper highway uses. The mere fact that instead of placing concrete on some of the property taken, a stream is to be diverted across it or a gravel pit dug thereon, does not change the *legal* nature of the use from that of highway use to those actual physical uses to which the land is devoted. In other words, when the Highway Department takes a tract of land and excavates gravel, the use is not for gravel purposes but for *highway* purposes. When land is taken for the diversion of a railroad or to be exchanged, the use is not the digging of gravel or the placement of a railroad thereon, or any other ultimate physical use, but a highway use.

There is one difference between the situation in the Brown case and the State's position in this case. In the Brown case, the Idaho statute under which they were condemning did not specifically incorporate a provision

which authorized the taking of the land for the purpose of the exchange. In our case, we have a specific legislative declaration on the subject authorizing the State to take lands for that identical purpose and declaring it to be a highway purpose. It is true that the act of Congress authorizing the construction of the irrigation project did confer authority upon the Federal Government "to purchase or condemn and to improve suitable land for a new town site to replace the portion of the town of American Falls which will be flooded by the reservoir • • ." The Federal Government was, therefore, using the Idaho condemnation statutes having to do with the taking of property for all public purposes and which contained no specific reference to property to be taken for exchange purposes. *It was therefore necessary for the court to hold that the taking of the land for the exchange was for one of the public purposes named in the statute if the Idaho statutes were to be used.* In our case, the statutes are all part of the general authority conferred upon the Highway Department to exercise the power of eminent domain and the taking of property for exchange purposes is specifically called a highway use.

The appellant in our case argues that since a railroad will ultimately be placed on the property, we must use the railroad condemnation statutes. Such an argument applied to the Brown case would have resulted in the use of as many different condemnation statutes as there were different uses to be made of the property after it was traded. *The Idaho statute ordinarily used for irrigation purposes could not have been used for any of the property taken.* If it was proposed to take any of the property for the purpose of being traded to someone for use as a private dwelling it could not have been taken under any statute. It is elemental that Congress cannot

enact a statute authorizing a taking for private purposes any more than a state legislature. Therefore, unless the taking could be called a taking for some public purpose, there could be no authority of any sort. The court could not say that the public purpose was for the erection of private dwellings and stores (the actual physical use in that case, just as the construction of a railroad is to be the actual physical use in our case) because such uses are not public uses. If the appellant in our case is right in his argument, Mr. Chief Justice Taft should have held that as to those parcels which were to be traded to persons for private use, there could be no taking and that as to those parcels which were to be devoted to public purposes, the government must name all of these uses and then apply a different statute to each such use. The most substantial argument advanced was that the Congress did not have any power to condemn because it was being taken to be sold for uses other than public ones. The court unhesitatingly brushed even that argument aside and squarely held that the taking was for a *public purpose* and *"that the public use of the reservoir covered the taking of the town site."* And the use of the one statute for taking all the property was approved. There was only one possible public use for which the property could be said to have been taken—the irrigation project—and, therefore, that was named. We believe that this decision is controlling and that it establishes a principle that definitely answers and refutes all the theories the appellant in our case has advanced.

On the oral argument below the appellant advanced the theory that all the Brown case determined was that the taking was for *some* public purpose. They then reasoned that since the actual physical use in our case was to be for railroad purposes (which we do not concede)

the purpose was public in nature and that the decision in the Brown case meant nothing. They are not correct. *What the court did determine was that the final use made of the property after it was traded had nothing to do with determining whether the taking was for a public or a private use.* The final and actual physical use of the property in that case was certainly not public in nature, in and of itself. The land was devoted to private uses almost exclusively. Mr. Chief Justice Taft, therefore, was compelled to disregard the ultimate physical use of the property in determining the legal nature or character of the taking.

In the assignment of error in the Brown case, it was set up that the district court had erred in holding that the United States had authority under the acts it was using *"to exercise the right of eminent domain and condemn the priva. lands of these plaintiffs in error for town site purposes."* The district court in its decision, however, had said:

> "Upon the other hand it must be conceded that generally the Government is without the power to engage in the promotion of town sites, *and unless the enterprise here bears a substantial relation to the irrigation project, it cannot be held to be of such a public character as to warrant the exappropriation of private property.* • • • The town site may or may not be profitable; the promotion of such enterprises is necessarily a speculative and hazardous business. *But assuming that it will be profitable, an enterprise by which private property is taken for essentially private uses is not rendered public by the fact that the incident profit is to be applied to public purposes.* Were the proposed use of an expected profit the criterion, the right of the government to take private property would be unlimited. It might condemn not only the requisite site for a post office, but likewise an indefinite amount of other property merely to be

sold back into private ownership, at a profit out of which to pay for the site. However, the case here presents other considerations."

Mr. Chief Justice Taft, therefore, certainly had before him the precise question involved in our own case. The plaintiffs there were vigorously asserting that the actual and ultimate physical use to which the property was to be put after the government had acquired it and traded it was controlling in determining whether the use for which the land was taken was a public use or a private use. The district court recognized that fact and, as we have shown above, passed squarely on the point *and made it clear that the actual uses made of the property after the taking and the exchange had nothing to do with determining the legal character and nature of the purpose for which the property was taken.* The Supreme Court of the United States upheld that view. This reasoning, applied to our case, means that the fact that the land is to be traded to a railroad and devoted to railroad uses after that exchange, is not to be considered by the court in any way in deciding the first and most important question in this case—the exact nature and character of the purpose for which the land is taken. It matters not whether we pay close regard to what the court reasoned in the Brown case when it said "unless the enterprise here bears a substantial relation to the irrigation project, it cannot be held to be of such a public character as to warrant the exappropriation of private property." *It is at least certain that the court did not say that the taking was for a public purpose because the uses to which it was to be put after the exchange which were private in nature governed.* We are unable to see how the argument of counsel and the statements of the courts in that case can be interpreted to mean anything other

than that *the taking was for a public purpose because it was a taking for the irrigation project. In our case the taking is, therefore, a taking for a public purpose because it is a taking for highway use.*

Since the courts in the Brown case could not determine that the taking was for a public purpose by reason of the fact that the ultimate physical uses were to be public (because they were actually private), they must either have had to say that it was a taking for the irrigation project *or to declare that taking property for the purpose of making an "exchange" was a new and independent public purpose.* It matters not which one of these we apply to our own case. If the taking is to be declared for a public purpose because taking it for "exchange purposes" is a new and special public purpose, then it most certainly is not a taking for railroad purposes and there exists no good and valid reason why a special mode of procedure may not be prescribed for that new and special public purpose.

2. *Michigan Supreme Court has held this to be a taking for highway purposes.*

The Michigan Supreme Court has had before it upon two occasions the claim that this property was being acquired for "railroad purposes". Upon each occasion the court has emphatically said that the property was being acquired under the proper statute for "highway purposes".

In the first case before our Supreme Court in which this question was raised the court said:

"Having in mind that the primary purpose of Act No. 340, Pub. Acts 1927, was that of highway construction and improvement, and that the relocation of the railroad right of way was inseparably connected with the project, we hold that the working out of the whole problem was properly delegated by the legislature to the State Highway Department under the terms of the contract embodied in the statute. The undertaking was declared by the legislature to be a public necessity. See Act No. 340, Pub. Acts 1927, sec. 4. It is conceded in plaintiff's brief that the proposed highway improvement is a public necessity which requires the taking of the railroad's present right of way. *Everything now sought to be done by the State highway commissioner is expressly authorized by the act of the legislature.* The project is one of great importance to the people of the State; and presumably under Act No. 340, Public Acts 1927, and the terms of the contract embodied therein, the complicated situation involved in this highway construction and improvement is being worked out in a more practical, economical, and advantageous manner for all parties concerned than it otherwise could have been. *The general method of procedure has the stamp of approval of the high authority in the case of Brown v. United States, supra; and this court ought not to interfere with the consummation of the contract embodied in Act No. 340 unless it clearly contravenes constitutional provisions.* * * * *Such legislation can and should be sustained because the relocation of the railroad right of way has been rendered necessary by and incident to the highway improvement; and the property sought is being taken for public use. We do not find that the statutes involved offend against the Constitution or that there is any irregularity in the proceeding conducted by the State highway commissioner."*

Fitzsimmons and Galvin v. Rogers, 243 Mich. 649.

In the second case arising out of this project our Supreme Court settled a decree and used therein the following language:

> "This is a highway project and the property and property rights in question are being properly acquired for highway uses and purposes under the provisions of Act No. 352 of the Public Acts of 1925 as amended by Act No. 92 of the Public Acts of 1927".
>
> Decree in Johnstone v. D. G. H. & M. Ry. Co., 245 Mich. 65.

In the present case the Statutory Court for the Eastern District of Michigan, Southern Division, summed up the situation and disposed of this contention in the following language:

> "It is claimed by the plaintiffs that, because their land, if taken as sought, will itself be used not by the state as a part of the proposed new highway, but by a railway company as a part of its right of way, such land is being taken not for highway purposes, within the meaning of the law, but for railroad purposes, and that therefore it cannot be condemned under the so-called highway condemnation statutes of Michigan, as the state is seeking to do, but only under the railroad condemnation statutes of the state, and as these railroad statutes, it is said by the plaintiffs, afford a more liberal and favorable measure of damages to the owners of property taken thereunder, the plaintiffs insist that in the present case they are discriminated against, as compared with the owners of property condemned by railroad companies in other cases; and that consequently they are being denied the equal protection of the laws guaranteed to them by the Federal Constitution. I cannot agree with this argument, which, I think,

is completely answered and overruled by the decision of the United States Supreme Court in Brown vs. United States, 263 U. S. 78. Under the principle applied in that case, I am satisfied that, in view of the object here sought to be accomplished by the state, the taking of this land must be regarded as a reasonable adaption of proper means for the acquisition of this land for highway purposes and that the fact that such land is not to be physically used as a part of the highway thus sought to be constructed does not change the real nature of the transaction, which is the taking of land for the widening of a public highway. The same principle was announced and applied, under substantially similar circumstances, in Pitznogle vs. Western Maryland Railroad Co., 119 Md. 673, 87 Atl. 917, and Rogers vs. Bradshaw, 20 Johnson (N. Y.), 735. *This condemnation proceeding is brought by the state, in its own interest and for its own public purposes, and not by, nor on behalf of, a railroad company; and its object is the condemnation and taking of property for the purpose of improving a public highway and not for any railroad purpose.* There is, therefore, no sound basis for this contention that the proceedings here sought to be enjoined will result in either the denial of the equal protection of the laws or the deprivation of property without due process of law."

The appellant argued that this court in its decision in the case of Brown vs. United States, 263 U. S. 78, did not have before it any question of a denial of the equal protection of the laws and that therefore it was not to be considered an authority in their case. We called the court's attention to the fact that in the Brown case since the ultimate use of the property was in a large number of instances to be private, (because the person to whom the property was to be traded would use it for private dwellings or stores or similar uses), the claim was made that the taking was for a private and not a public purpose

and therefore prohibited by the Constitution. *It was therefore necessary for the lower court in that case to determine whether or not the legal purpose of the taking of the property was to be determined by the character of the ultimate physical use to which the property would be devoted after it had been acquired and traded.*

Very property *that court* held that the legal purpose for the taking was the same as the purpose for which the land to be used for the reservoir was taken. This court in recognizing that the acquirement of the appellant's land in that case was so closely connected with the taking of the land actually to be physically used for the reservoir "that the public use of the reservoir covered the taking of the town site", established a fundamental rule which the lower court in this case and our own State Supreme Court in the two cases before it, held, governed the taking of property by the State in the present situation.

Our State Supreme Court has held that the acquisition of this plaintiff's land for the purpose of trading it for that part of the old right of way which was to be actually used for the new highway was so closely connected with the acquirement of property for the highway itself as to be a part of the highway project. The close interconnection has thus been established by our State tribunal just as the lower court in the Brown case found that the acquisition of the plaintiff's land there was so closely connected with the building of the reservoir as to be covered by the public purpose which warranted the construction of that irrigation project. In this case the appellant seeks to present to this court the same argument presented on behalf of the appellant in the Brown case. He argues that since the actual and ultimate physical use to which the land is to be devoted after it has been acquired and traded to the railroad is a railroad use, the character

of the legal purpose is to be determined from that fact. We believe that the correct rule was established in the Brown case and that when it can be demonstrated that property is being acquired for the purpose of trading it for other property which will be physically used for a highway purpose, the property so acquired is being taken for a highway purpose. *Our State Supreme Court and the District Court in this case have squarely and emphatically held that the problems attendant upon the acquirement of a few miles of right of way out of the heart of a great railroad system through condemnation are so great as to make it almost impossible.*

Our State Supreme Court has held that the solution adopted by the Legislature in Act No. 340, Public Acts of 1927, whereby the State agreed to procure a new right of way to be exchanged for the old, was "being worked out in a more practical, economical and advantageous manner for all parties concerned than it otherwise could have been". The court had said that:

> "Having in mind that the primary purpose of Act No. 340, Public Acts of 1927, was that of highway construction and improvement and that the relocation of the railroad right of way was inseparably connected with the project, we hold that the working out of the whole problem was properly delegated by the Legislature to the State Highway Department under the terms of the contract embodied in the statute".
>
> Fitzsimmons & Galvin, Inc. v. Rogers, 243 Mich. 649.

It is difficult to conceive of a case more closely paralleling the situation in our case than is presented by the facts in the Brown case.

In the Brown case, the appellant in his brief said:

> *"It is clear, we think, that the right of the government to condemn the land in question must be denied unless the project contemplates the use of the said land in some intimate manner connected with the construction of the reservoir in question,* and the government in this case provides us with no such connection. * * * *In condemning this land, the government does not desire to retain it but to dispose of it and this disposition to the public is not, and cannot be, a public use.* No agent or instrumentality of the government intends or proposes to use the land in question."

This court was therefore confronted with the precise question involved in this case. The plaintiffs were there vigorously asserting that the actual and ultimate physical use to which the property was to be put after the government had acquired it and traded it was controlling in determining whether the use for which the land was taken was a public use or a private use. The District Court recognized that fact, passed squarely on that point and *made it clear that the actual uses made of the property after the taking and the exchange, had nothing to do with determining the legal character and nature of the purpose for which the property was taken.* This court upheld that view. *This reasoning applied to our case means that the fact that the land is to be traded to a railroad and perhaps devoted to railroad uses after that exchange is not to be considered by the court in any way in deciding the first and most important question in this case,—the exact nature and character of the purpose for which the land is taken.*

The fact that there was no question raised with regard to a denial of the equal protection of the laws in the

Brown case is unimportant. *We must first determine the rule to be followed in naming the character of the legal purpose authorizing the taking of this appellant's property. Having settled upon the rule and applied it to the facts in our case, if we reach the conclusion that this is a taking for "highway purposes" there can be no question of a denial of the equal protection of the laws when the usual and regular highway condemnation statutes are employed, as in our case.*

The District Court in the Brown case pointed out that the government was confronted with innumerable difficulties in trying to take the property in the old town site. In our case the State is confronted with difficulties equally insurmountable. It is to be doubted whether the State could successfully condemn a nine-mile strip out of the heart of this railroad for this public highway project. The difficulty of appraisal even though it could be legally condemned can be appreciated. To quote from the language of the District Court: "it may be fairly concluded that without such authority it would be impractical for the (State) to execute the (highway) project."

3. Other authorities sustain the state's position.

This court cited, in support of its position in the Brown case, the case of Pitznogle vs. Western Maryland Railroad Co., 119 Md. 673, 87 Atlantic 917. The Chief Justice has stated the facts in that case to be that,—

> "A railroad company condemned a piece of land for its tracks and yards and in doing so appropriated a private right of way which was the only access of certain other land owners to the public highway. It was held that the railway company could condemn an

additional strip of land for a substitute right of way to be furnished to these land owners."

The plaintiffs in that case contended:

"(2) That the petition is insufficient as a basis of a judgment of condemnation, *because all of the land sought to be acquired thereby is not, as alleged in the petition, to be used for railroad purposes, but a part of it is to be used 'for the location of a substitute private road in place of the existing private road,'* which is to be closed and used by the petitioner for railroad purposes."

The court discussed the proposition that, while there was no express prohibition in the state constitution against the taking of private property for private use, the general interpretation of the constitution did prohibit such a taking. The court, therefore, had before it precisely the same problem that is presented by our case. If the use of the land was to be declared a private use, because after it had been taken and exchanged, the actual physical use to be made of it was to be that of a private way, the railroad would clearly be exceeding its power and the proceeding would fail. The court in commenting on this said:

"It is not contended by the defendants that the use of the land for railroad purposes is a private and not a public use, *but they contend that the use of a part of the land for the location of a private road in substitution for the existing private road, which is to be closed and used by the plaintiff company for railroad purposes, is a private use of said land;* and that inasmuch as the petition does not state or designate how much and what part of the entire parcel of land so sought to be condemned is to be used for the location of said private road, and

how much and what part is to be used for railroad purposes, the whole must fall. *The correctness of this contention must be conceded, should we hold, under the facts and circumstances of this case, that the use of a part of said lands for such private road or way is a private use and not a public use. But is it a private use? • • • Without the use of this road or private way for the purposes that we have mentioned, the plaintiff would be defeated in its proposed plan of straightening its road and of enlarging its yard, and to close this road without substituting for it another road or way would deprive those entitled to its use of the means of reaching the pike from their homes, and they would not be permitted to condemn a private road or way (Arnsperger v. Crawford, supra) in substitution for the road lost to them, resulting from its necessary use for railroad purposes, which the court has time and again said was a public, and not a private, use. • • • The condemnation of a part of this land here sought to be condemned for a substitute private road or way is incident to and results from the taking by reason of public necessity, of the existing private road for public use, and the use of it for such purposes should, we think, be regarded as a public use within the meaning of the Constitution.*"

Pitznogle v. Western Maryland R. R. Co., 119 Md. 673, 87 Atl. 917.

It will be seen that the plaintiffs in that case raised precisely the same question as that now confronting this court. If the ultimate use to which the land taken was to be devoted had governed, it would have been a taking for a private use unquestionably, and the court recognized this fact when it said:

"The correctness of this contention must be conceded should we hold under the facts and circum-

stances of this case, that the use of part of said lands for such private road or way is a private use and not a public use."

The court rejected that theory and emphatically said that the character of the whole project was determined by the use to which the land for which it was exchanged was to be put.

We have discovered that there is yet another case to be found in the United States involving this same problem. This was a case decided in February, 1823, by the Supreme Court of the State of New York. In that case, the action was for a trespass. The defendant was performing work in building or constructing a canal for the state. It became necessary to take part of the turnpike belonging to a private corporation in order that the canal might be properly completed. The plaintiff's land had been condemned for the purpose of trading it to the turnpike company for the relocation of their private turnpike. The defendant justified on that ground. The court had this to say:

"It was shown in proof, that the route of the northern canal, at the place in question, was directed by the chief engineer; *that the turnpike road adjoining the place where the trespass was alleged to have been committed, was unavoidably encroached on by the tract or course of the canal, and that another road was indispensable at that place,* and must have been made before the canal was commenced.

"Here the question occurs: Were not the Commissioners authorized, by this act, to enter upon the land of the defendant in error, and to use it to the extent and in the manner stated in the record? The Supreme Court have answered the question in the

negative, *because they say, the entry was not for the prosecution of the canal improvements, but to make a substitute for part of the turnpike road, which was broken up and taken for the canal. But if the turnpike road was unavoidably encroached on by the canal, and another road was indispensable at that place, before the canal was commenced, and the land taken was necessary for the road, (and all this was proved in the cause,) it would seem to follow, as a clear logical deduction, that the land taken was necessary for the prosecution of the improvements intended by the act. It is very certain, according to the testimony, that the improvement of the canal, at the place specified, could not be prosecuted without the road; and if so, the road was necessary for the improvement.* Besides, the commissioners were made the judges as to what lands were necessary for the prosecution of the improvements;

"*Upon the very straitened construction set up, on the part of the defendant in error, it might truly be said that if the course of the canal met a house or barn, or barrack, or shed, standing in its way, it could not be removed to the right hand or to the left, and placed upon the adjoining land, of the same owner, without committing a trespass upon that land. It might just as well be said, in such case, as it has been said in this, that the new ground taken for the occupation of the building, was not taken for any purpose immediately connected with the canal, but as a substitute for the site of a house or barn, which was broken up and taken for the canal*". Rogers v. Bradshaw, 20 Johnson, 735.

The court had presented to it precisely the same problems and questions we have before us, and the contention was made that the character of the use for which the land was taken was to be determined by the ultimate and actual physical use to which it was to be put. In that case, after it had been traded to the turnpike com-

pany, it was to be used physically for a turnpike. The court disposed of that contention, however, and said that the taking was for canal purposes. As the court concluded, after setting up the hypothetical cases where a house or barn should be moved to the right or left to make way for the canal:

> *"It might just as well be said in such case, as has been said in this case, that the new ground taken for the occupation of the building, was not taken for any purpose immediately connected with the canal, but as a substitute for the site of house or barn which was broken up and taken for the canal."*

The three cases we have quoted from rather liberally above indicate that in all of those cases where the question has been raised, the courts have uniformly decided that the character of the public use to which the land taken is to be devoted is determined by the nature of the public use to which the land for which it is traded is devoted. In no instance has the actual physical use made of the land after the exchange been determinative of the legal character of the public use. In the Brown case the actual physical uses were, as we have set forth, of an unnumbered variety. Some of the uses may have been public. Certainly a large number of the uses were private. If the argument advanced by the appellant in our case is to be considered at all, it must result in a manifest absurdity. A different statute for the condemnation of each separate parcel of land in the new town site would have been called into play because each parcel may have been used for some purpose differing from the use to which the other lots or parcels were put. If any of the lots were to be devoted to private uses, the property could not be taken because of the constitutional prohibition against a taking for a private purpose. As an

actual matter of fact, only one statute was used. *The determination of the court that all the parcels of property used for the new town site were being taken for irrigation purposes, classified the project and the purpose of the taking, and that classification determined which statute should be used.*

In the Pitznogle case the same argument and reasoning is to be found. The railroad was taking the additional property under the railroad condemnation statute. It could not have condemned under any other statute. If the plaintiffs' contentions were right, the taking was for a private purpose and the railroad had no authority whatsoever. Yet, we find the court calling this a taking for railroad purposes. In the New York case the taking was likewise for canal purposes and the canal condemnation statutes were used. There was no denial of the equal protection of the laws in any of these cases.

4. *Different highway uses will vary the elements and amount of damages but will not change the legal character of that use.*

In determining the amount of damage suffered by a property holder where part of his property is taken, the use to which the property taken will be put is, of course, important. In taking property under the highway statutes, if the property taken is used for the actual laying out of the highway, the elements of damage will be measured and circumscribed by that fact. If the actual highway use for which the land is taken is for the excavation of gravel and it results in a great yawning pit close to a beautiful residence located on the balance of that tract of land, the elements of damage which

must be taken into consideration in fixing compensation will necessarily be different from those involved in the case where the land is actually devoted to the laying out of the highway. This variation in the elements of damage will undoubtedly result in a great variation in the actual damages paid for the taking of the property. This is the law of Michigan, and it was so determined by our State Supreme Court in its two decisions which have heretofore been handed down in this matter. The fact that, instead of the appellants' property being actually used for one of the two highway purposes just mentioned, it is going to be used for another highway purpose, may and undoubtedly will, bring into the problem new and different elements of damage for which they must be compensated. The physical presence of the railroad upon the property will be an added or different element to be considered by the commissioners in assessing compensation, just as the fact that if a pit were to be dug upon the property it would of necessity vary the factual situation. Our Supreme Court, in considering this precise question, involved in this project said:

> "In the present case as in an ordinary proceeding for condemning a right of way for a railroad, it will be the duty of the commission 'to compensate the owner for what his landed interest will suffer from the use proposed to be made of it by the railway company.'"
>
> Fitzsimmons & Galvin, Inc. v. Rogers, supra.

It does not, however, lay any foundation for a claim of a violation of the due process or equal protection clause of the Federal Constitution.

The legislature of the State of Michigan has given its attention to the problems involved and has specifically

termed this a taking for highway purposes. Its expressions on that point are to be found in the statutes the State is employing in this project. Our State Supreme Court has twice passed on the question and each time held this to be a taking for highway purposes. Our State Highway Department has proceeded to take the property for highway purposes and upon that theory has spent several millions of dollars and acquired all the needed property with the exception of the few parcels involved in these cases. The State Administrative Board, the Governor, the State Treasurer, the Attorney General, and all the State officers concerned have by their official acts, in perfect good faith, interpreted the whole matter in the light of its being a highway purpose. The imperative necessity for widening Woodward Avenue has been the cause of the whole undertaking.

5. *The state highway commissioner possesses authority to acquire lands to be traded to a railroad for a new right of way where part of the old line is needed for the widening of a public highway.*

The highway commissioner undoubtedly possesses the power to acquire lands for this special trading purpose. In Section 23 of Act 352 of the Public Acts of 1925, which is the highway condemnation statute, under which we are acquiring appellant's property, we find the following provision:

> "The provisions of this chapter shall be deemed to extend to and include the right • • • to acquire and take property desired by the commissioner or commissioners to exchange for other property which

in his or their opinion it is necessary to acquire for public highway purposes whenever he or they have agreed in writing with the owner or owners of such property for such exchange. * *"

In addition to this section, a special act was passed by our Legislature for the sole purpose of authorizing such trades. This was act 215, P. A. 1925. Section 1 of that statute reads:

"Whenever the line of any railroad or railway company is upon or adjacent to the right of way of a trunk line highway and such right of way or any part thereof, is necessary to be acquired for widening, straightening, altering or otherwise improving such highway, the state highway commissioner shall be authorized to enter into negotiations with such railroad or railway company for the purchase of said right of way, or of any part thereof, and to enter into an agreement with any such railroad or railway company to exchange other designated property for such right of way, or for any part thereof, whenever such other designated property shall be acquired by him; and whenever any such agreement has been entered into, the said state highway commissioner shall be authorized and he is hereby empowered to acquire such other property by purchase or condemnation, and when acquired to execute the necessary conveyances and releases thereof to such railroad or railway company for its use, and to take in exchange therefor the railroad or railway right of way or part thereof for such public highway purposes in accordance with such agreement."

Our State Supreme Court, in the cases of Fitzsimmons & Galvin, Inc. v. Rogers, 243 Mich. 649, and Johnstone, et al v. D. G. H. & M. 245 Mich. 65, has placed its stamp of approval upon the authority conferred upon the highway commissioner by these two statutory provisions. The court said:

"Many cases cited in plaintiff's brief are distinguishable from the instant case in that the right of eminent domain was there attempted to be exercised to accomplish a purpose not authorized by law; *but here we have a case wherein the state highway commissioner has been specifically authorized and empowered by legislative enactment to do exactly that which he seeks to accomplish in this proceeding. Such legislation can and should be sustained because the relocation of the railroad right of way has been rendered necessary by and incident to the highway improvement; and the property sought is being taken for public use.*"

Fitzsimmons & Galvin Inc. v. Rogers, 243 Mich. 649.

These words by our State Supreme Court leave no room for doubt. The State Highway Commissioner in exercising the authority conferred upon him by these statutory enactments has proceeded to acquire practically all of the land needed for this exchange. In Act 340, P. A. 1927, we find set forth the entire contract entered into between the State and the railroad company for the exchange of the new right of way for the old as authorized by Act 215, P. A. 1925, and Section 23 of Act 352, P. A. 1925, referred to above. In Section 1 of the act setting forth the contract, we find additional authority conferred upon the state to acquire these lands for trading purposes. *Since our Supreme Court has considered all of these acts and has interpreted them to mean that the highway commissioner is specifically authorized to acquire lands for the purpose of trading them, to this particular railroad, the appellants' objections on this score are without force.*

B. *The Michigan Supreme Court has held that this*

property should be acquired under the provisions of the highway condemnation statute.

The appellant has argued that the Legislature has authorized the use of any one of three condemnation statutes. He contends that this has given an arbitrary power to the Commissioner which denies him the equal protection of the laws. *Our State Supreme Court has passed upon the statutes conferring power upon the Highway Commissioner and has emphatically said that he is only empowered to use the highway condemnation statute.* The court has considered the claims here advanced by this appellant and has said that neither of the other two statutes he mentions can be considered applicable. This interpretation of the statutes authorizing the Highway Commissioner to condemn this property, is the construction which must of course be followed by this court.

The appellant's argument that Section 2, Act 215, authorizes the use of "either one of two separate, distinct, and different condemnation acts" is not valid in the face of our Supreme Court's declaration that this section directs him to use only the highway condemnation statute.

In the cases before our State Supreme Court the contention was quite seriously made that when Section 2 of Act 215, P. A. 1925, specified that the procedure to be used in condemning the land should be that "provided for the condemnation by state agencies and public corporations", it did not mean that the statute ordinarily used for the condemnation of property for highway purposes should be employed. Our Supreme Court rather shortly dismissed that argument after pointing out that in the act authorizing the contract between the State and

the railroad company (Act 340, P. A. 1927) the state highway commissioner had been authorized to secure the right of way "in accordance with the general laws of the State". The court said:

> "We are of the opinion that the Legislature intended that the state highway commissioner in carrying into effect the provisions of Act 340, P. A. 1927, should proceed as far as possible in conformity with the provisions of the highway condemnation law; and that by his so doing the plaintiff will not be deprived of property without just compensation, or without due process of law."
>
> Fitzsimmons & Galvin, Inc. v. Rogers, supra.

This position was reaffirmed in the second case before our court arising out of this same project, although it did not discuss that question at any great length. In the decree in this last case the Supreme Court said:

> "This is a highway project and the property and property rights in question are being properly acquired for highway uses and purposes under the provisions of Act No. 352 of the Public Acts of 1925 as amended by Act No. 92 of the Public Acts of 1927."
>
> Johnstone v. D. G. H. & M. Ry. Co., supra.

C. *The Michigan Supreme Court has held that the State has observed all the statutory requirements and the property is being acquired in accordance with due process of law.*

The two opinions of our Supreme Court we have repeatedly referred to, are both full of expressions indicating that the State has carefully observed all of the re-

quirements contained in the highway condemnation statute under which we are proceeding. The decision in the first case before that Court contains many statements bearing out our contention. The court at one point said:

> " * * * but the contention is rightly made by the plaintiff herein that since we have certain constitutional and statutory provisions which specify the methods and conditions of exercising this power, the state as well as every other agency which utilizes this method of acquiring private property must proceed in accordance with the constitutional limitations and with the provisions of the statute insofar as they do not contravene the constitution."
> Fitzsimmons & Galvin, Inc. v. Rogers, supra.

The court then proceeded to consider one after another of the various objections which were raised and which are now presented to this court and concluded their opinion with the following significant language:

> "We do not find that the statutes involved offend against the constitution *or that there is any irregularity in the proceeding conducted by the State Highway Commissioner.*"

The appellant did not at any time in his argument before the lower court in this case present any proof or make any claim that we were not scrupulously following the exact letter of the highway condemnation statute. The question of whether due process has been observed has been feebly advanced. In view of the fact that our court has held that we have observed all of the statutory requirements, such a claim is without merit.

The statute under which we are proceeding provides:

"The highway act under which the commissioner is here proceeding provides for a determination of necessity by a hearing before the state highway commissioner and for an assessment of damages by three court commissioners. Act 352, P. A. 1925, Sec. 7. This, we think, fully protects the plaintiff's constitutional rights."

Fitzsimmons & Galvin, Inc. v. Rogers, supra.

D. *Interpretation of our state statutes by our Supreme Court is binding upon Federal Courts.*

1. The construction and constitutionality of state statutes by a State Supreme Court will govern the Federal Courts.

The state statutes involved in this case have been set forth in their entirety in the appendix to this brief. These various statutes have been construed by our State Supreme Court. The decisions of that Court construing these statutes are, of course, binding upon the Federal Courts.

"In the construction of local statutes, the decision of a state court of last resort will govern the Federal courts * * *."

27 R. C. L. 44.

The same is true with regard to the question of whether a statute violates our State Constitution.

"A decision of a state court of last resort that a state law is not in conflict with the state constitution is binding on the Federal courts * * *."

West v. Louisiana, 194, U. S. 258, 48 L. ed. 965.

The general rule regarding the construction and constitutionality of state statutes has been discussed at great length in Ruling Case Law:

> "It has long been recognized that the highest court of the state is the one having the right finally to determine whether an act of a state legislature, passed with the usual forms necessary to its validity is in fact in violation of the state constitution, *and in cases reaching the federal courts the latter usually will not consider questions as to whether state laws violate provisions of the state constitution.* * * * *Even the Supreme Court of the United States will accept the interpretation of a statute of a state affixed to it by its court of last resort.*"
> 6 R. C. L. 85.

That authority has also said:

> "Thus, in passing on the constitutionality of a state statute, the Supreme Court of the United States will follow the decisions of the state court of last resort, as to the purpose and scope of the statute, and will only determine whether the statute as so construed is in conflict with the federal constitution. This same rule of federal acquiescence in the construction of state enactments is applied to state constitutional provisions where the question is raised as to whether they conflict with the constitution of the United States. All state enactments, whether in the form of laws or constitutional provisions, may come within the general rule under consideration, and the construction applied to them by state tribunals will normally be accepted by the federal courts."
> 6 R. C. L. 87.

In a case before the Supreme Court of the United States, we find a declaration to the same effect:

"In exercising that jurisdiction, it was nevertheless the duty of the trial court to follow and be guided by the decisions of the highest state court upon the construction of the statute, and upon the question whether as construed the statute violated any provision of the state constitution. The same duty rests upon this court and it has been so determined from the earliest period of its history. * * * We should not be justified in holding the act to be in violation of the state constitution in the face of clear and repeated decisions of the highest court of the state to the contrary, under the pretext that we are deciding principles of general constitutional law. If the act violates any provision, expressed or properly implied, of the federal constitution, it is our duty to so declare it, but if it do not, there is no justification for the federal courts to run counter to the decisions of the highest state courts upon questions involving the construction of state statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law."

Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369,

General American Tank Car Corp., v. Day, 270 U. S. 367, 70 L. ed. 635,

Ashe v. U. S., 270 U. S. 424, 70 L. ed. 662,

Palmer v. Ohio, 248 U. S. 32, 63 L. ed. 108.

As we have pointed out in the earlier pages of this brief, the appellant's entire case revolves about his contention that the state should proceed under the provisions of the so-called "railroad" condemnation statutes instead of using the regular "highway" condemnation law. When the appellant raises the point that the district court erred because it failed to find that our state statutes directed the use of the railroad statutes instead of the highway acts, he has overlooked the fact that our State Supreme Court has construed the various statutes

in question and has said that the state is directed by the legislature to use the "highway" statutes and not the "railroad" statutes. He is asking this court to ignore the construction of Michigan statutes by the Michigan Supreme Court. In the case of Fitzsimmons & Galvin, Inc., v. Rogers, 243 Mich. 649, our court passed upon the meaning of that part of Act No. 340 of the Public Acts of 1927 which authorized the condemnation by the State Highway Commissioner of the property needed for this project. The court said:

> "By Act No. 340, Pub. Acts 1927, Sec. 4, the State highway commissioner is authorized and empowered to secure this right of way 'in accordance with the general laws of the State.' The present proceeding instituted by him is 'in accordance with the general laws of the State;' and if those laws are properly administered plaintiff's rights as to just compensation will be fully respected. *A reference to the railroad act will disclose several reasons why it would be impossible for the State highway commissioner to file a petition thereunder.* For example, that statute (2 Comp. Laws 1915, Sec. 8252) requires the petition to be in the name of the railroad company, and to be signed and sworn to by a director or other representative of the railroad company. *We are of the opinion that the legislature intended that the State highway commissioner, in carrying into effect the provisions of Act No. 340, Pub. Acts 1927, should proceed as far as possible in conformity with the provisions of the highway condemnation law; and that by his so doing the plaintiff will not be deprived of property without just compensation, or without due process of law.*"

This, we believe, effectively disposes of all those claims of error based upon a so-called erroneous interpretation of Act No. 340 of the Public Acts of 1927 by the district

court. *In a later section we shall show that our Supreme Court has compared the highway condemnation statute with the railroad statute and has said that the measure of damages is the same under either act. This interpretation is binding upon this court.*

E. *Regardless of whether the property is being acquired for highway purposes or for railroad uses, a proper classification has been adopted and the use of the highway statutes in acquiring the property is justified.*

1. The Legislature has a wide range of discretion in establishing classifications.

Assuming for the purposes of this argument only, that this is a taking for railroad purposes rather than highway uses, there yet remains the question of whether the classification adopted is reasonable. It is the state's position that regardless of whether this is a taking for highway or for railroad purposes, the peculiar facts and circumstances to be found in this case justify and warrant the use of the statutes employed for the condemnation proceeding, and that the classification is reasonable. The fact that this might be regarded as a taking for railroad purposes does not mean that different railroad statutes could not be adopted and used, where the legislature felt that the facts warranted the establishment of a classification and the adoption of different modes of procedure for the different classes so set up. The general rule with regard to classification is well expressed in Ruling Case Law where it is said:

"In the exercise of its power to make classifica-

tions for the purpose of enacting laws over matters within its jurisdiction the state is recognized as enjoying a wide range of discretion. *The question of classification is primarily for the legislature, and it can never become a judicial question except for the purpose of determining, in any given situation, whether the legislative action is clearly unreasonable.*"

6 R. C. L. 384.

When a classification of any kind is attacked in the courts, the question, as it presents itself to the court, is not whether the court believes the classification is reasonable but whether or not the legislature might not have reasonably determined it to be so. Or, to put it in other words:

"Before a court can interfere with the legislative judgment, it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. When the classification in a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed."

6 R. C. L. 385.

Certainly, in our case there is presented a more than reasonable ground for distinguishing and for setting up the classification established, if we are to consider it as such. It is not necessary that there be an exact and scientific line drawn, or that the classification be based upon some particularly outstanding difference, characteristic of the group or class distinguished from all others.

"But if the classification is not wholly unreason-

able and arbitrary so that the statute is uniform in its operation on all the members of the class to which it is made applicable, no one is denied the equal protection of the laws guaranteed by the Federal Constitution. It has been said that it will be upheld unless it is so manifestly inequitable and unjust that it will cause an imposition of burdens on one class to the exclusion of another without reasonable distinction."

6 R. C. L. 380.

The court must be able to say that there is no reasonable relation to the object within the governmental authority.

Chicago B. & Q. R. R. Co. v. McGuire, 210 U. S. 549, 31 Sup. Ct. 259; 55 L. ed. 328.

It must say that the classification is clearly arbitrary and unreasonable:

"This court has many times affirmed the general proposition that it is not the purpose of the Fourteenth Amendment in the equal protection clause to take from the states the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the Court can declare it beyond the legislative authority. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78, and previous cases in this court cited on page 79. That a law may work hardship and inequality is not enough. Many valid laws from the generality of their application necessarily do that, and the Legislature must be allowed a wide field of choice in determining the subject matter of its laws, what shall come within them, and what shall be excluded."

Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 35 Sup. Ct. 167, 59 L. ed. 364.

In view of all the great differences between the ordinary case of a railroad starting to build for the first time and the present instance where there is a relocation with all its attendant problems; in view of the fact that this will be a special rapid transit service instead of an ordinary railroad line, we are sure that there is every reason to distinguish between the ordinary railroad condemnation proceeding and the present case. With the authority to lay down different statutes for different railroads it is certainly possible to differentiate between the taking by a railroad for ordinary purposes and a taking for these special purposes by the State.

The appellant's objections to the use of the highway statutes are based on the claims that he is being denied a trial by jury on both the question of necessity and damages; that he cannot recover attorney's fees under the highway statutes allowed him by the railroad statutes; and that the measure of damages was not the same in the two acts. As we have pointed out elsewhere in this brief, our State Supreme Court has considered these objections and has construed the two statutes to be substantially the same, so far as the important claimed differences are concerned. In a Montana case where property was being taken for irrigation purposes, an objection was raised that a certain irrigation statute should be used rather than the statute actually employed in the case. The objection in the words of the court was:

> "That the statute denies to one originally in the district the right of jury trial upon the question of benefits received or damages suffered by his land; and that it discriminates in favor of the landowner whose property is brought into the district after it is organized by extending to him the right to have the

question of benefits or damages determined by a jury."

In re. Valley Center Drain Dist., 64 Mont. 545, 211 P. 218.

It will be noted that the objection in that case was precisely parallel with the objection in our own case. The plaintiffs there contended that since there was a different procedure prescribed for some of those whose land was taken for the irrigation project, there was a denial of the equal protection of the laws. Every land owner in that case was having his property taken for the irrigation project, just as in our case the appellant contends that all the property owners are having their land taken for railroad purposes. The contention was made in that case that, since all the land taken was to be devoted to irrigation purposes, the same statutes must be used in all cases, and every property owner was entitled to exactly the same type and form of procedure. The denial of a jury was one of the major differences complained of. It is difficult to imagine a case that comes closer to our own. The court, however, disposed of that argument in the following words:

"The statute does not deny to the land owners, whose properties are included in the district originally, the equal protection of the law. The rule that general laws shall operate uniformly does not prohibit a reasonable classification of subjects. *The situation of the land owner whose property is originally in the district is so very different from that of the land owner whose property is brought in after the district is created, as to furnish the basis for a reasonable classification; hence, the statute is not open to this objection.* In re Organization of Bench Canal Drainage Dist., 24 Wyo. 143, 156 P. 610."

In re Valley Center Drain Dist., 64 Mont. 545, 211 P. 218.

The application of the court's reasoning in that case to the facts in our own case makes the conclusion inescapable that there is more than ample reason for distinguishing between the position of property owners whose land is being taken for a new railroad on one hand and for the relocation of an old railroad on the other hand.

In a California case a municipal water and power company was seeking to take land by eminent domain for the establishment of a city water system. This property was being taken from a privately owned water power company. Instead of using the ordinary procedure prescribed in the general law, a special procedure was authorized. The contention was made that this denied the plaintiffs the equal protection of the laws. In the words of the court in stating the facts:

> "The contention that the procedure authorized by the Public Utilities Act deprives the appellant of the equal protection of the laws is based upon the discriminations to which we have just referred between the mode of condemning property under the general law and that provided by section 47 for condemning the property of public utilities in certain cases. None of these discriminations as we have seen goes to any matter of especial justice or fundamental right. *The constitutional provision under consideration does not prohibit a state from establishing different rules of procedure for different classes of cases or litigants, provided the variations relate to matters of procedure and do not operate to deprive any class of substantial equalities in the adjudication of its rights or liabilities.* 12 C. J. 948, Cin. State R. R. Co. v. Snell, 193 U. S. 30, 24 Sup. Ct. 319, 48 L. ed. 604, Cook v. Ray Mfg. Co., 159 Cal. 694,

115 P. 318. *In condemnation proceedings, so long as the state provides a fair and equitable and judicial inquiry in which the parties interested are allowed to be heard and present evidence and are protected in their right to have just compensation, they are not deprived of the equal protection of the laws because the state, under authority of its own Constitution, has seen fit to provide for other classes of cases a different method or a different tribunal for accomplishing the same result.* Ry. Co. v. Tel. Co., 65 S. C. 459, 43 S. E. 970; Kennebec Water D. v. Waterville, 96 Md. 234, 52 Atl. 774. "

Marin Municipal Water Dist. v. Marin Water & P. Co., 178 Cal. 308, 173 P. 469.

In that case the general statute applicable to those ases where property was being taken by the state or unicipality for such purposes was not used. Instead, special procedure was employed and the same objecion was there raised as we now find confronting us in ur cases. The court's argument, in disposing of the qual protection theory in that case, is equally applicable o the situation in the instant case.

A somewhat similar situation is presented in an Iowa ase. Property was being taken by a school district for chool purposes. In Iowa, there is a general statute uthorizing the use of the power of eminent domain for orks of internal improvement. The taking in that case as under a special statute, and the argument was made hat the plaintiffs were denied the equal protection of the aws because the general statute had not been followed. he plaintiff pointed out a number of differences beween the two statutes.

"The argument of counsel in support of this posi-

tion is, in effect, that the distinction made by the statute between proceedings for condemnation of works of internal improvement generally and proceedings for condemnation for schoolhouse sites is an unreasonable and arbitrary discrimination which contravenes the constitutional rule. We are not persuaded that the distinction is either unnatural or arbitrary. *To constitute a violation of the constitutional provisions in this respect, the unreasonable character of the discrimination must clearly appear. It is not enough that it may seem to the court unwise or unnecessary, but its arbitrary character must admit of no reasonable doubt.*"

Munn v. Independent School Dist., 188 Ia. 757, 176 N. W. 811.

These cases certainly make it clear that the right and power to classify in eminent domain is not to be denied upon any such ground as that advanced by the appellants in our cases. They are being deprived of no substantial thing, because our court has held *that they will receive just compensation.* The courts have said that to doubt the validity and reasonableness of a classification is to resolve in favor of its constitutionality. It is the general rule that before the courts can say that a classification established by the legislature shall not stand, it must appear that it is essentially "arbitrary and not merely possibly but clearly and actually unreasonable." (6 R. C. L. 385.)

The Supreme Court of our State has made it clear that no matter what procedure may be used, the constitution requires the payment of "just compensation" and has defined that to be,—

"In the present case, as in an ordinary proceeding

for condemning a right of way for a railroad, it will be the duty of the Commissioners 'to compensate the owner for what his landed interest will suffer from the use proposed to be made of it by the railroad company.' Barnes v. R. R. Co., 65 Mich. 251. *Adequate compensation is such only as puts the injured party in as good condition as he would have been in if the injury had not been inflicted. It includes the value of the land or the amount to which the value of the property from which it is taken is depreciated.* Grand Rapids, etc. R. R. Co. v. Heisel, 47 Mich. 393. *There is no provision in our statutes for offsetting benefits against damages incident to taking land for a railroad right of way; and in the absence of an express statutory provision, such a deduction cannot be made.* Detroit, etc. R. R. Co. v. National Bank, 196 Mich. 660; State Highway Commissioner v. Breisacher, 231 Mich. 317. With this construction placed upon the highway act, it is not subject to the objection that it fails to provide adequate compensation for the property owner and is, therefore, unconstitutional. Nor does it leave force to plaintiff's contention that since it is here sought to condemn a railroad right of way, the procedure must be under and in accordance with the general railroad act rather than under the highway law."

Fitzsimmons & Galvin, Inc. v. Rogers, 243 Mich. 649.

In the other case before our Court we find a further explanation indicating that the statute we are using will fully protect the appellant and assure him of just compensation.

"Section 4, Act 92, Pub. Acts 1927, provides for determination by the State highway commissioner of the damages which should be paid as compensation for the taking of each parcel of property. This determination with payment, tender or deposit of

the award for the benefit of the owner is the basis for the state's taking possession. Subsequent proceedings for final appraisal of compensation by commissioners appointed by a court follow in due course. The determination by the state highway commissioner will so establish the condemnation proceedings as to insure plaintiffs and all others similarly situated an opportunity to obtain adequate compensation."

Johnstone v. D. G. H. & M. Ry. Co. supra.

Apparently the plaintiffs are contending that they are entitled to something more than "just compensation" and that if some other statute might possibly confer a greater amount of damages, they are denied the equal protection of the laws, even though the statute under which their property is taken complies in all particulars with the due process clause and furnishes just and adequate compensation. Yet they have not attempted to argue that the offsetting of benefits will in any way deprive them of any part of "just compensation". It might be remarked, in passing, that the condemnation statutes used by the Federal Government in the Brown case, supra, contains an express provision for the offsetting of benefits. We are unable to see how the question of classification can be in any way affected by the questionable contention that the actual net result in cash may vary according to the statute used. The inequality of result, if any develops, will have no bearing upon the question of whether the classification is reasonable and not aribtrary. It was pointed out in Ruling Case Law,— "the mere fact of inequality in no manner determines the matter of constitutionality".

The basis for classification in this case rests in the dif-

ference in character of the condemning agency and in the peculiar and special circumstances surrounding the project for which the property is taken. Either one of these is sufficient to justify the adoption of the procedure the State is employing. The very difficulties inherent in the project furnished an adequate reason for the legislature, and no one can say that, after considering all the many problems with which the State was confronted in constructing this highway project, it did not have ample reason to believe that the Gordian knot could best be cut by using the highway procedure. Part of the land to be acquired was to be used for constructing substitute public highways for those closed or cut off by the railroad line. Streets along the proposed new right of way were to be altered, straightened and widened. There was a great probability that instead of using any of the property for ordinary railroad purposes, it would be used for a special rapid transit system. This expectation is being fulfilled and that is to be the character of the line constructed on this property. The Rapid Transit Commission of Detroit has recommended and the State has considered the matter of making many alterations in State trunk line highways both bisecting and parallel to the new right of way. The property taken is, therefore, devoted to many different uses and purposes, in addition to part being used for a special and particular kind of railroad development. All these things, together with many others which might be named, furnished a real and certainly reasonable basis for the adoption of a special procedure in condemning the property. It most certainly was not a case of taking property for ordinary everyday railroad purposes exclusively. And in considering the matter, the court must, of course, take into consideration the fact that the burden is upon the appellant to show that the classification is clearly and unmis-

takably unreasonable. The general rule is well expressed in Ruling Case Law to be:

> "One who assails the classification in a law must carry the burden of showing that it does not rest on any reasonable basis, *but is essentially arbitrary, and not merely possibly, but clearly and actually unreasonable.*"
>
> 6 R. C. L. 385.

The appellants have made no attack upon the reasonableness of the classification except on the ground that the actual net result of the application of the two statutes may result in a different figure. They have certainly not met nor borne the burden of showing that the classification is arbitrary and clearly and actually unreasonable.

The Michigan Supreme Court, in Fitzsimmons & Galvin, Inc. v. Rogers, supra, has pointed out several reasons which would justify the classification. The Court said:

> "A reference to the railroad act will disclose several reasons why it would be impossible for the State Highway Commissioner to file a petition thereunder. For example, that statute (2 Comp. Laws 1915, sec. 8252) requires the petition to be in the name of the railroad company and to be signed and sworn to by a director or other representative of the railroad company."

The Court might have pointed out several other differences along that line, any one of which would warrant the legislature in directing that the only statute which should be used was the highway statute and not the railroad laws.

The appellant has contended that the classification, if allowed to stand, will result in an inequality of result when his land is taken, as compared with a taking for the same purpose by a railroad. In making this contention the appellant has not taken into consideration the fact that the very reason for classification is to legalize and make proper the infliction of inequality upon those in the different classes.

> "It has been said that it is of the essence of a classification that on one class are cast duties and burdens different from those resting on the general public, and that the very idea of classification is that of inequality, *so that the mere fact of inequality in no manner determines the matter of constitutionality.*"
>
> 6 R. C. L. 374.

The appellant, ignoring this fundamental, has argued in substance that whenever property is taken which ultimately is to be devoted to some particular physical use, the lowest measure of the statutory proceeding for the taking of that property, regardless of the character of the condemning agency, is the statute that is most favorable from the standpoint of the amount to be paid as damages. *In other words, appellant contends that whenever property is taken for railroad purposes, there will always be a denial of the equal protection of the laws, if the statute under which their property is taken affords him less than the most favorable railroad condemnation statute to be found anywhere on the books.* The appellant argues that because the statute which a railroad would use, (if the taking were directly by a railroad for private use) would afford him in dollars and cents more than he believes he can obtain when the State

condemns under a different statute, and because part of this monetary difference will be caused by the fact that a jury can be obtained in one case and not in the other, he is being denied the equal protection of the laws. When reduced to these terms it will be obvious that this is not an inequality in the constitutional sense.

2. *A classification in eminent domain cases is based on the character of the agency seeking to take the property.*

The basis upon which classifications have been established has usually been determined by the character of the party seeking to exercise the power. The legislature has been accorded a great deal of latitude in making these classifications. In Corpus Juris we find it said—

> "In the absence of a constitutional provision on the subject, the mode of exercising the right of eminent domain is within the discretion of the legislature, untrammeled by any limitation except that the purpose is a public one, and that just compensation be paid or tendered to the owner of the property taken, and the power to prescribe rules of procedure may be delegated. * * * The procedure by which property is to be condemned and compensation assessed is not ordinarily prescribed by constitutional provisions. This matter is usually left to the discretion of the legislature. Accordingly, in probably all jurisdictions, general statutes have been enacted which provide a mode of procedure to be followed in condemnation and assessment cases generally, and which are commonly referred to as the eminent domain acts. *In addition to these acts, general statutes have been adopted prescribing a special procedure applicable to particular classes of cases, the classification being based either on the nature of the pur-*

pose for which the property is sought to be taken or on the character of the party seeking to take it. Thus, a special procedure is commonly provided where property is sought to be taken for the purpose of a street or highway; a park; a drain, levee, or sewer; a canal or water way; a wharf or dock; irrigation or water supply; a dam; a railroad; a turnpike or toll road; a telegraph or telephone line; or electric light and power supply; *which enumeration of purposes involves the classification, just alluded to, based on the character of the party seeking condemnation, as where petitioner is a state or a state officer or board; a city, county, or town, or a municipal officer or board; a drainage levee, or irrigation district; a water works company; a railroad company; a turnpike or toll road company; a telegraph or telephone company; or an electric light and power company.* * * * In the case of municipal corporations, a mode of procedure is not uncommonly embodied in their charters; and the same is true in a measure of private corporations, especially quasi public corporations, such for instance as railroad companies. *Furthermore, a mode of procedure is not infrequently provided by special or private acts relating to individual corporations whose charters are wanting in that respect.*

20 C. J. 874.

Speaking on this same general subject, Lewis on Eminent Domain has this to say with regard to how the authority may be given:

> "This is purely a matter of legislative discretion, unless limited by the constitution. The authority may be given by a special act to a particular person or corporation, or by a general act or general incorporation laws."

Lewis on Eminent Domain, (3rd ed.) Vol. 1, p. 683.

Not only may this right be conferred in most any manner the sovereign sees fit, so long as due process is observed, but it may likewise have two or more valid acts in force at one and the same time conferring the power upon a single municipality.

> "*There may be two complete acts in reference to the same subject matter, such as the construction of gravel roads, the acquisition of parks, etc., though having inconsistent provisions, under either of which proceedings may be had,* if the legislature expressly declares in the second that it was not their intention to repeal any former act on the subject. So a corporation may have the option of proceeding under its special charter or under the general law."
>
> Lewis on Eminent Domain, (3rd ed.) Vol. 1, p. 698.

In other words, there is a sufficient basis for classification when there is nothing more than a difference in the character of the party seeking to exercise the power of eminent domain. *If a property is to be taken for railroad purposes by a railroad on the one hand and to be taken for precisely the same purpose by a state on the other hand, two separate and distinct rules of procedure may be laid down without violating the equal protection clause of the constitution, so long as just compensation is paid.*

The power of the State to classify railroads and to extend different remedies to different classes is beyond questioning. There need be only some possible state of facts to justify the drawing of a line and the application of different rules to the different classes. (6 R. C. L. 385.) The authority may be given by a special act to a particular person. (Lewis on Eminent Domain (3rd ed.)

Vol. 1, p. 683.) We have pointed out to the court any number of reasons why the special circumstances of this case warranted the application of a special procedure. Remembering the general rule that "*if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed,*" (6 R. C. L. 385) this court need only look to the great difficulties to be encountered in establishing a new line through twenty-eight restricted subdivisions, crossing a great number of important state and county highways where special grade separations would be required, *and to recall that this is not a building of a new railroad but the relocation of an old one.* It is certainly a vastly different thing to relocate a line already established, than to merely lay out a new railroad. Many different problems will arise from the abandonment of the old and establishment of the new line that could not be present where only a new line is to be built. Many people will have the line simply moved from one place on their property to another. Others who now are served by the old line will find themselves without it when the change is made. The inherently difficult problem that Mr. Chief Justice Taft remarked in the Brown case—the utter impossibility of saying just how much the businesses and things in the old town were worth—is likewise present in our case. How much is a nine mile piece taken out of the heart of a railroad system worth?

The granting of a special statute to union depot companies is justified either on the ground that the paramount power to prescribe the methods is not hedged about by the plaintiffs' objection or on the ground that the slight difference in the precise railroad use warrants it or because there is a difference in the character of the condemning agency. If the building of a union

depot is enough different from building an ordinary depot to justify the use of two different statutes, the difference between building a new railroad and in relocating an old one is more than ample to sustain the classification in our case. In addition, there are all those other differences we have just named. (See Backus v. Fort Union Depot, 169 U. S. 557.)

The Michigan Supreme Coourt has pointed out that there are many conditions named in the railroad statute that cannot be met by the highway commissioner. The very language of that statute renders it impossible for him to use it. (See Fitzsimmons & Galvin, Inc. v. Rogers, supra.)

F. *The provisions of the highway condemnation statute and railway condemnation statute have been found by our State Supreme Court to be substantially identical.*

The ground upon which this appellant relies is that the two statutes are clearly different and that the use of the highway condemnation statute deprive him of both precedural and substantive rights. At one point in his brief he contends that the two statutes "allow different measures of damages to be paid to the property owners for the property taken and damaged". In elaboration of this claim he contends that he is deprived of his right to consequential damages and will have benefits offset. We are unable to understand his claim that he will be deprived of consequential damages. The state has consistently maintained from the beginning that he is entitled to any consequential damage to the remainder of his property demonstrated by the proof, and the state

not only was committed to that proposition when before the courts, but have likewise conceded that point before the Commissioners who are even now, at the time this brief is being prepared, hearing testimony with regard to the damages suffered by this appellant. In a case decided in September, 1929, our Supreme Court, in defining the rule obtaining in this state with regard to the measure of damages where part of a parcel of land is taken by eminent domain, said—

> "Where only part of a parcel is taken, just compensation is to be determined by the amount which the value of the parcel from which it is taken is diminished. The value of the part actually taken is allowed as direct compensation, but the decreased value of the residue of parcel on account of the use made of the land taken, is also allowable as compensation. Port Huron, etc., R. Co. v. Voorheis, supra; *Fitzsimmons & Galvin, Inc. v. Rogers, 243 Mich. 649; Johnstone v. Ry. Co., 245 Mich. 65.*"

In Re: Widening of Bagley Avenue, 248 Mich. 1.

It will be noticed that in laying down this rule our Court has cited in support of its statement the two cases having to do with the highway project involved in this present proceeding.

The same rule is enunciated and made clear in another case decided at the same time the Bagley Avenue case was handed down. In this last case the court quoted with approval from the cases of Fitzsimmons & Galvin, Inc. v. Rogers, and Johnstone v. D. G. H. & M. Ry. Co., supra, and among the other citations, sets forth a citation from 20 Corpus Juris, 730:

"The measure of damages is the injury done to the fair market value of the entire tract by the taking of only a part. In other words, the owner is entitled to recover the difference between the market value of the entire tract before the taking and the market value of what is left after the taking."

In Re Widening of Fulton Street, 248 Mich. 13.

The Michigan Supreme Court has ruled that, except as to inconsequential matters of procedure, there is no distinction or difference of any importance between the two condemnation statutes in question. *In the case of Fitzsimmons & Galvin, Inc. v. Rogers, 243 Mich. 649, the court compared the terms of the two statutes at great length and pointed out that the same result would be reached regardless of which statute might be employed to condemn the property.* We shall not burden the court with a citation of all those parts of the court's opinion wherein it disposes of the arguments having to do with the claimed differences between the two statutes. In considering the objection that the use of the highway statutes deprive the appellant of the claimed right of a trial by jury, the court said—

"It is true that the railroad act (chap. 157 2 Comp. Laws 1915) affords a jury trial but it does not follow that the legislature may not provide a proper procedure without trial by jury. The present undertaking is a State project and as such clearly falls within the exception found in the State Constitution as to the right of a jury trial. The constitutional provision is as follows:

" 'When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the State, shall be ascertained by a jury of twelve freeholders

residing in the vicinity of such property, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law: Provided, That the foregoing provision shall not be construed to apply to the action of commissioners of highways or road commissioners in the official discharge of their duties.' Art. 13, Sec. 2.

"'In the absence of a special constitutional or statutory provision there is no right to trial by jury in condemnation proceedings. Due process of law does not require the damages in such proceedings to be assessed by a jury.' 20 Cyc. p. 999.

"The highway act under which the commissioner is here proceeding provides for a determination of necessity by a hearing before the State highway commissioner, and for an assessment of damages by three court commissioners. Act No. 352, Pub. Acts 1925, Sec. 7. This, we think, fully protects the plaintiff's constitutional rights."

Fitzsimmons & Galvin, Inc. v. Rogers, 243 Mich. 649.

In considering the claim that the measure of damages would not be the same, the court said:

"4. The plaintiff strenuously insists that it will be unable to recover full compensation for damage to its property if it is taken for railroad purposes under the highway act because the measure of damage provided in the highway law is less than that specified in chapter 157, 2 Comp. Laws 1915, which contains the general provision for condemnation of railroad rights of way. That one legislative act may contain a different provision than is found in another as to the measure of damages is not controlling. The test is whether the provision in the act falls short of the constitutional requirement for just compensation. *A comparison of the provisions of these two acts relative to the damages to be awarded dis-*

closes a close similarity with the exception of the provisions for payment of costs and an attorney fee required by the railroad act. The provision in the latter act as to damages (2 Comp. Laws 1915, sec. 8255) is that the commissioners (or jury) 'shall ascertain and determine the damages or compensation which ought justly to be made.' The highway law provision (Act No. 352, Pub. Acts 1925, Sec. 16) is:—'The court commissioners shall appraise the damages to be paid as compensation,' etc. It is true that the highway law of this State provides that in fixing compensation the benefits accruing to the property owner are offset against the damage awarded. See Act No. 352, Pub. Acts 1925, Sec. 18; In re Macomb County Board of County Road Com'rs, 242 Mich. 239. *But it does not follow from this that in a proceeding wherein the State highway commissioner is seeking to secure a right of way, the damage to be awarded the porperty owner will be anything short of the 'just compensation' provided in section 2 of art. 13 of the Constitution. In the present case, as in an ordinary proceeding for condemning a right of way for a railroad, it will be the duty of the commissioners to compensate the owner for what his landed interest will suffer from the use proposed to be made of it by the railroad company.* Barnes v. Railway Co., 65 Mich. 251. Adequate compensation is such only as puts the injured party in as good condition as he would have been in if the injury had not been inflicted. It includes the value of the land, or the amount of which the value of the property from which it is taken is depreciated. Grand Rapids, etc., R. Co. v. Heisel, 47 Mich. 393. There is no provision in our statutes for offsetting benefits for a railroad right of way; and in the absence of an express statutory provision such a deduction cannot be made. Detroit, etc., R. Co. v. National Bank, 196 Mich. 660; State Highway Commissioner v. Breisacher, 231 Mich. 317. With this construction placed upon the highway act, it is not subject to the objection that it fails to provide adequate

compensation for the property owner and is therefore unconstitutional. Nor does it leave force to plaintiff's contention that since it is here sought to condemn a railroad right of way the procedure must be under and in accordance with the general railroad act rather than under the highway law."

V.

THE PLAINTIFF HAS AN ADEQUATE REMEDY AT LAW.

The State at the time this brief is being written is conducting hearings before the Michigan statutory commission for the purpose of fixing the damages to the appellant's property. It is entirely possible that by the date of the argument of this case the proofs may have been completed and the case submitted to the commissioners. The appellant has presented to the commissioners precisely the same objections presented to this court in the present case. All of these objections can and will undoubtedly be reviewed by our State Supreme Court in the event the appellant is dissatisfied with the finding made by the commissioners. We stress this point because it establishes our contention that all of the objections that appellant raises can and should be presented at law and not raised in an equity court for the purpose of obstructing the carrying forward of this most important State highway project.

The State has succeeded in purchasing all of the property needed for the relocation project, except the appellant's property, the property of his brother immediately adjoining it (and who was a party plaintiff in an action instituted at the same time and heard along with this

case in the lower court), another parcel belonging to the same family as *cestius que trust* and three other small parcels.

The questions raised by the appellant are in essence simply objections to the rules of procedure which the appellant complains *may* be followed in assessing his damages. These objections can and properly should be raised in the condemnation proceeding itself. If the State *should* apply the wrong rule certainly this appellant has recourse upon appeal to our State Supreme Court, and that tribunal will undoubtedly compel the State Highway Commissioner to follow the correct rule of law. Thus far in the proceeding the State has made no attempt to ask the commissioners to consider any *benefits* that may accrue to the appellant's property, and the State has been offering proof without any reference to such benefits.

If the statutory method being pursued is entirely incorrect, then the appellant, upon pursuing his objections already made by him in the condemnation case, will be able to reverse the commissioners' determination and compel the State to commence anew. *Even if he should be successful in all his contentions, he could not prevent entirely the construction of this project. The State is certainly entitled to proceed under one statute or the other and the problems involved have simply to do with matters of procedure in arriving at the damages to be awarded.* The continued use and occupation of the property will, therefore, not change his legal position in the slightest, nor will it deprive him of any additional thing of value. He should be remitted to his remedy at law and compelled to pursue that remedy until or unless it de-

velops that the State is actually depriving him of his constitutional rights.

CONCLUSION.

The special statutory tribunal from whose findings the appellant appeals gave careful consideration to all the objections now raised and was unanimous in rejecting them all. It spent several months analyzing the objections and unanimously decided that the constitutional rights of this appellant were not being violated. The majority of that tribunal adopted the State's contention that the appellant's property was being acquired for a highway project. While this seems to us to be the correct ground upon which to arrive at the result, the reasoning advanced by the third member of that court is just as sound and conclusive as the one relied upon by the majority. The classification is based upon substantial grounds. The State has advanced both lines of reasoning, although it prefers to rest its case upon the argument that this property is being taken for a highway project.

The State is proceeding in an orderly manner in acquiring this appellant's property. It is now engaged in presenting proofs on the questions of damages before the commissioners duly appointed for that purpose. The special statutory tribunal has unanimously held that we are preserving the appellant's constitutional rights in so doing. The appellant's objections have to do solely with questions of procedure which have been raised before the tribunal now engaged in the task of fixing his damages. The appellant has his remedy at law and is now being accorded his day in court. Delay in the completion of this highway project will not afford the appel-

lant any protection he does not now possess. The unanimous action of the statutory court in rejecting the plaintiff's objections should not be disturbed, and we, therefore, respectfully urge upon the court that it dismiss this repeal and remit the appellant to his remedy under the State statute now being employed.

Respectfully submitted,

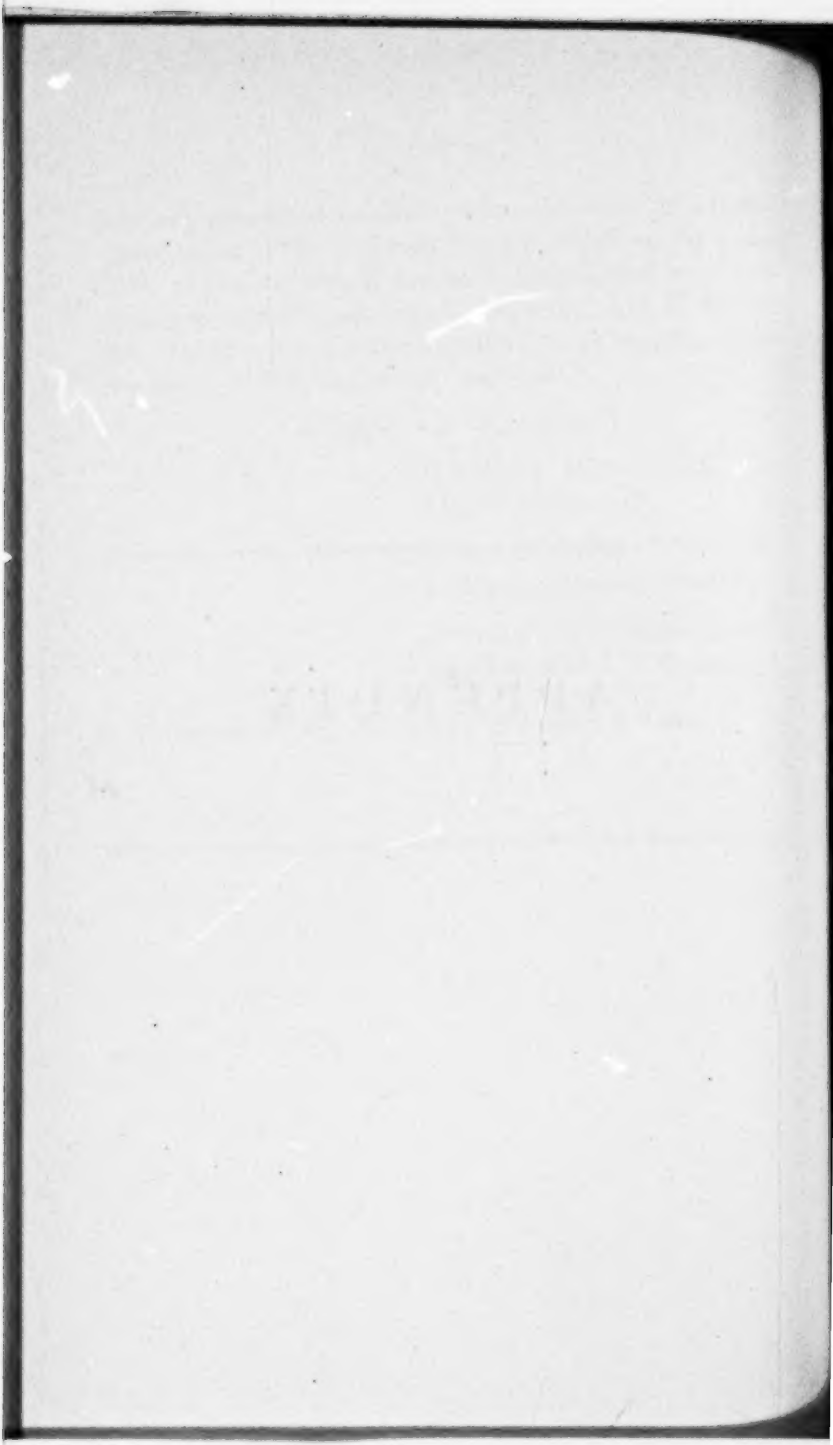
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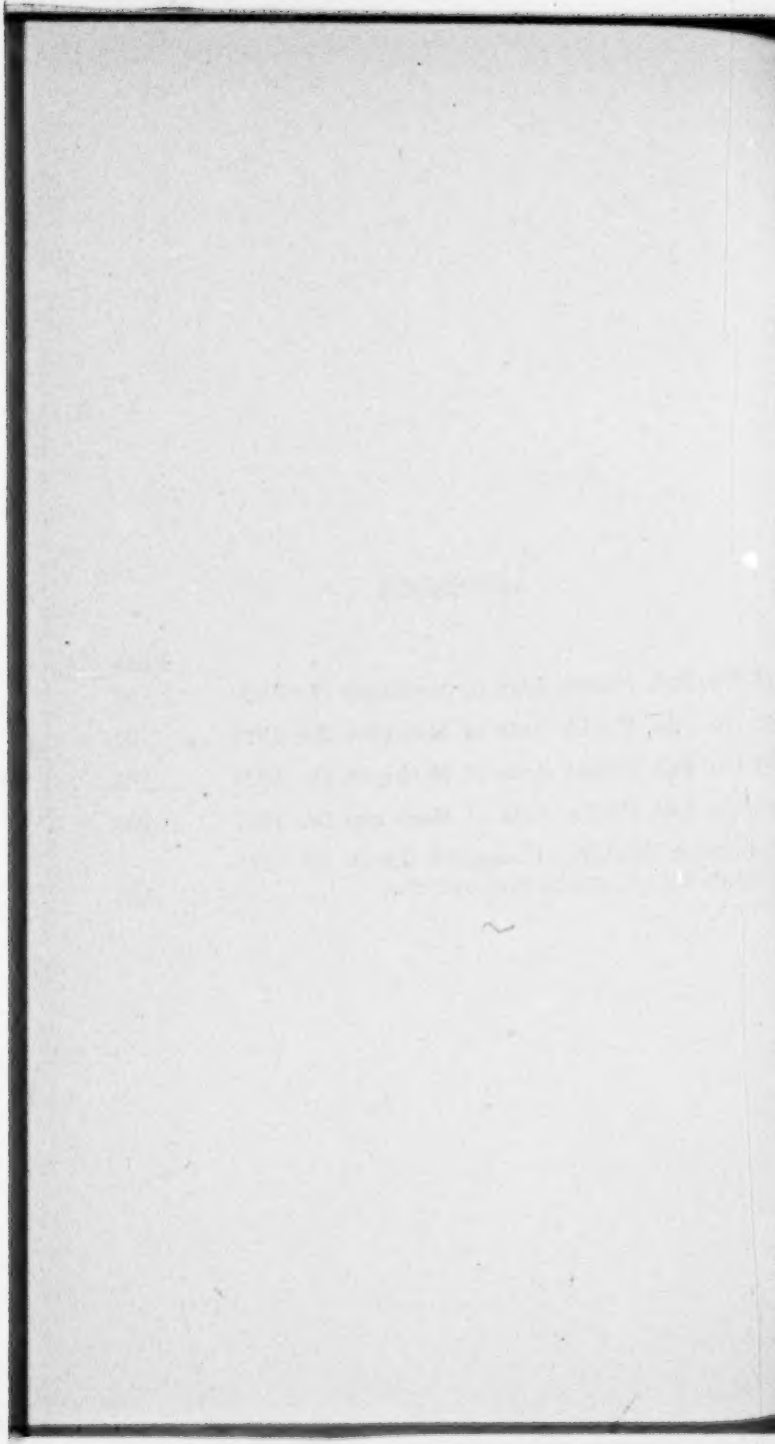
Dated at Lansing, Michigan, February 6, 1930.

APPENDIX



APPENDIX

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HIGHWAY CONDEMNATION STATUTES

Act No. 352 of 1925

AN ACT to provide for the purchase and condemnation of private property for public highway purposes.

The People of the State of Michigan enact:

SECTION 1. Township highway commissioners, by and with the approval of their respective township boards. boards of county road commissioners, and the state highway commissioner are each hereby authorized and empowered to secure by gift or purchase from the owners thereof:

(a) Property for the right of way for any road to be laid out, altered, or widened, or for changing the line thereof;

(b) Gravel, rock, sand, dirt and any and all other materials that may be needed for the proper construction, improvement or maintenance of a road;

(c) Property deemed by the commissioner or commissioners to be necessary to give to persons using a road a clear view of approaching persons and vehicles, cars, trains and other instruments of travel, at any intersection of a road with another road or with a railroad or railway track;

(d) Property deemed by the commissioner or commissioners to be necessary to change the channel of any water course, natural or artificial, in order to maintain a proper alignment of any road without crossing such water course and the riparian rights of any person, firm or corporation in or pertaining to any such water course;

(e) The fee or any lesser estate in land abutting on any highway right of way and deemed by the commissioner or commissioners to be necessary for the storage of road machinery, equipment or materials;

(f) Any and all other property and property rights deemed by the commissioner or commissioners having

jurisdiction over a road to be necessary for the proper construction, improvement or maintenance thereof.

SEC. 2. Property for a township road shall be secured by the township highway commissioner and shall be taken in the name of the township. Property for a county road shall be secured by the board of county road commissioners and shall be taken in the name of the county. Property for a trunk line highway shall be secured by the state highway commissioner and shall be taken in the name of the state. Property for right of way shall be acquired by a release duly executed by the owner or owners of the lands and acknowledged and witnessed in the manner provided by law for the acknowledging and witnessing of deeds. All such releases shall be recorded in the office of the register of deeds of the county in which the land is situated.

SEC. 3. Property for road purposes shall be paid for by the commissioner or commissioners out of any funds under their control, appropriated for that purpose.

SEC. 4. Whenever the commissioner or commissioners shall be unable to agree with any person interested in any such property for the purchase thereof, or whenever such person shall be unknown or a non-resident of the county, or a minor or an insane or incompetent person, the commissioner or commissioners may make a written determination of the necessity of the particular road construction, improvement or maintenance project for which such property is desired, the necessity for taking the particular property described and the damages which, in the opinion of the commissioner or commissioners, should be paid as compensation for the taking of each parcel of such property. Such determination shall also describe the property desired and shall give the name of each person interested therein, so far as known to the commissioner or commissioners making the determination. The declaration of the commissioner or commissioners that he or they have been unable to agree with the owner, or owners, for the purchase of such property and his or their determination of the necessity of the project and of taking the particular property described therefor, shall not thereafter be ques-

tioned: *Provided*, That no such determination shall be made by any township highway commissioner except after a hearing, of which written notice shall be given to each person interested in the property desired, at least seven days before the time of hearing, such notice to be served either personally, or by leaving a copy at the residence of the person or persons interested, or in the case of non-residents, by posting copies thereof in five conspicuous places in the township, one of which shall be on the property, and by mailing a copy thereof by registered mail addressed to the last known post-office address of each such non-resident person or persons: And *provided further*, That any person feeling himself aggrieved by any such determination of a township highway commissioner may, within five days after such determination, appeal therefrom to the township board in the manner that appeals are or may be taken from determinations of township highway commissioners relative to laying out a new road; and when any such appeal shall be taken the determination of the township highway commissioner shall not be of any force or effect unless and until the same be confirmed by the township board on such appeal.

SEC. 5. Such determination shall be filed with the township clerk if it be with reference to a township road, with the county clerk if with reference to a county road, and in the office of the state highway commissioner if with reference to a state trunk line highway, and a certified copy thereof shall be recorded in the office of the register of deeds of the county in which the property is situated. Compensation for the taking of the property therein described shall be paid or tendered to the owner thereof if known and residing in the county in which the land is situated, and if such tender be not accepted or the owner shall be unknown, or a non-resident of the county, by depositing the amount thereof with the township, county or state treasurer, as the case may be, the amount therein determined as the damages to be paid as such compensation, the same to be paid to the person or persons entitled thereto upon the execution or delivery of the proper release or releases or subject

to the order of the court in case of an award of damages by court commissioners as hereinafter provided.

SEC. 6. Upon the filing of such determination and proof of payment or deposit as above provided, the commissioner or commissioners having the matter in charge shall give notice thereof to the owners or occupants of the property therein described, which notice shall state that the said commissioner or commissioners are about to take possession of said property for the public highway purposes in said determination stated, and may also contain a notice to the owners or occupants of such property to remove their fence or fences and other obstructions and encroachments within thirty days thereafter. Upon the filing of such determination and the giving of such notice, as aforesaid, the title, and the right of possession to all of the property and property rights described in the determination shall vest in the township, county or state, as the case may be, for the purpose or purposes therein stated, and in case the owners or occupants thereof shall neglect or refuse to remove their fence, fences and other obstructions and encroachments within thirty days, the commissioner or commissioners shall have full power, and it shall be their duty to enter upon the premises with such aid and assistance as shall be necessary and remove such fence or fences, obstructions or encroachments without delay: *Provided,* That no person interested as owner, or otherwise, in any of the property described in such determination, shall be required to vacate or move any dwelling house or other building until after the damages to be paid as compensation, for the taking of such property, have been determined and paid or tendered.

SEC. 7. Within ninety days after the filing of any such determination, as aforesaid, the commissioner or commissioners having the matter in charge, unless they have been able to agree with the owners of the property therein described on the damages to be paid as compensation for such taking, shall file with the circuit court or probate court of the county in which such property is situated a petition, describing the road improvement for which the property is being taken, reciting that the said

commissioner or commissioners have made and filed the determination as hereinabove provided, and that he or they have taken, or are about to take, possession of the property described in said determination, for public highway purposes, describing the property for the taking of which he or they have been unable to agree with the owners on the damages to be paid as compensation, stating whether it is deemed necessary to take the fee of said property, so far as known to the commissioner or commissioners, or an easement therein, or the fee of part and an easement in part, giving the name of each person interested in each such piece or parcel of property, and praying for the appointment of three court commissioners to appraise the damages to be paid as compensation for the taking of each such piece or parcel of property for such road purposes.

SEC. 8. Upon the filing of the petition, the court shall make an order fixing a day for the hearing on such petition, which shall be not less than three weeks thereafter. Such order shall recite the names of the persons mentioned in the petition and the descriptions of each piece or parcel of property and shall state the purpose of the petition. A copy of such order shall be served, at least ten days before the day of hearing, upon each person named therein as being interested in the property to be taken, who is a resident of the county in which the property is located, and also upon the person or persons in possession of such property if it is in the possession of any person or persons other than the owner. Such service may be made personally or by leaving at the place of residence of the person to be served. Service may also be made upon persons interested in the property who are non-residents of the county.

SEC. 9. In cases where a minor or an insane or incompetent person has an interest in such property, service of a copy of the order shall be made upon the guardian, if any, and if such person has no guardian, the commissioner or commissioners may petition the court for the appointment of a guardian ad litem. Upon the filing of such petition the court shall appoint a guardian ad litem, who shall be a resident of the county and upon whom

service of a copy of the said order shall be made.

SEC. 10. Upon, or at any time after, the filing of such petition, the circuit judge, or the probate judge, as the case may be, shall make an order for the appearance of any person or persons interested in the property, or any part thereof on or before the day of hearing therein stated, upon proof by affidavit of any of the following facts:

1. That such person resides out of or is absent from the county, or his whereabouts unknown;

2. That it cannot be ascertained in what county, state or country such person resides.

SEC. 11. Such order shall be published once in each week for three successive weeks, in some newspaper published and circulated in the county, or in such other paper as the court may direct, and a copy of such order shall be mailed to each absent or non-resident person at his last known postoffice address, by registered mail, and a return receipt demanded. Proof by affidavit shall be made of such mailing, and whether or not a return receipt was received, and if one was received, it shall be attached to said affidavit; but such publication and mailing shall not be necessary in any case in which a copy of such order has been served on each such absent or non-resident person.

SEC. 12. Proof of publication and service may be made by affidavit of any person or persons having knowledge of the facts. Such proof shall be filed with the court on or before the day of hearing, and thereupon the court shall have jurisdiction of the subject matter involved in the proceedings and of the parties interested therein.

SEC. 13. On the day fixed as aforesaid, the court shall enter the default of all persons interested in the property described who have not appeared, and shall direct the payment to such persons of the sum or sums stated in the determination aforesaid, as compensation for the taking of the pieces or parcels of property in which they are interested; and the court shall also, unless sufficient cause to the contrary be shown, appoint three disinterested persons commissioners, herein called court com-

missioners, whose duty it shall be to appraise the damages to be paid as compensation for the taking of the property described in the petition, in respect to which an appearance is made, for public highway purposes. Said commissioners shall not be residents of the township in which the property sought to be taken is situated. The court shall fix the time and place for the first meeting of such court commissioners, and require their attendance; it may also authorize the court commissioners to adjourn their meeting from time to time not later than to a day to be named, and shall fix the time for filing their report.

SEC. 14. The court commissioners shall meet at the time and place ordered by the court and shall be sworn faithfully to discharge their duties. If all do not then appear, a less number may adjourn to a time certain, but no adjournment shall be made to a day later than the time allowed by the court. All adjournments shall be publicly announced. The court or the clerk thereof may issue writs of subpoena to compel the attendance of witnesses before the court or before the said court commissioners. Either one of such court commissioners may administer oaths to witnesses.

SEC. 15. The court commisisoners, at the time fixed by the court or at the time fixed by adjournment, shall view the premises described in the petition and shall hear the proofs and allegations of the parties. At such hearing the determination hereinabove provided for, or a certified copy thereof, shall be read in evidence before said court commissioners and shall be prima facie evidence of the ownership of the property therein described.

SEC. 16. The court commissioners shall appraise the damages to be paid as compensation to each person interested in each such piece or parcel of property, and shall report such decision in writing, signed by them or a majority of them, at or before the time fixed for that purpose, but it shall not be necessary for said court commissioners to report on all of such property at one time.

SEC. 17. It shall not be necessary for the commissioner or commissioners to include in one determination

the descriptions of all of the property necessary to be taken for any single project, or to include in one petition, the descriptions of all of the property described in the determination upon which such petition is based.

SEC. 18. If any discontinued highway shall be upon lands through which a new highway shall be laid out, the same may be taken into consideration in estimating the damages sustained by the owner of such lands; and in like manner the benefits accruing to owners of lands by reason of laying out, altering, widening or otherwise improving any highway or of changing the line thereof, shall be taken into consideration in determining the damages to be paid to any such owner as compensation for the taking of any of his property for any such highway purpose. In each such case, the commissioner or commissioners having the matter in charge, or the court commissioners, as the case may be, shall state such fact and the amount deducted on account thereof in the determination, or report, as the case may be; and should any special assessment be thereafter made upon such lands on account of such improvement, the owner or owners thereof shall be credited on such special assessment with the sums so deducted for benefits as aforesaid. In like manner, the court commissioners, in considering benefits, shall give to owners of lands already specially assessed on account of the improvement for which the property is being taken, credit to the amount of such special assessment, as against any allowance for benefits, in their determination of damages to be paid as compensation for such taking.

SEC. 19. The court may, at the time of the filing of the report or at such other time to which it may adjourn the proceedings, on cause shown, set aside the report and refer it back to such court commissioners or appoint other commissioners to re-try the questions involved, whereupon such proceedings shall be had as are hereinbefore provided for. The court may permit the amendment of any determination, petition, affidavit, order, report or proceeding filed or had in the premises in such manner as shall be just and proper; it may fill any vacancy that shall occur among the court commissioners,

by reason of death, resignation, removal or inability to act; it may at any time, in its discretion, remove any or all of said commissioners and fill the vacancy or vacancies thereby created; it may permit a defective proceeding to be set aside and other proceedings in compliance with law to be had in place thereof; it may adjourn such proceedings or any part thereof from time to time, and may make all such orders in the premises as may be just and proper to further and accomplish the purpose thereof.

SEC. 20. After the court shall confirm the report of the court commissioners, it shall enter an order authorizing the commissioner or commissioners to pay the several sums awarded for damages, and they shall pay the same accordingly. Such payment shall be made in money or by an order drawn on the proper township, county or state treasurer, to the several persons entitled thereto, and if refused, or if there be no person properly authorized to receive the same, or if the person entitled thereto is a non-resident of the county or cannot be found, it shall be deposited as directed by the court.

SEC. 21. The court shall fix the compensation of the court commissioners, not to exceed ten dollars per day, and determine the amount of necessary expenses incurred in connection with such proceedings, and the whole cost thereof.

SEC. 22. Any certificate, report or determination authorized or required by this chapter, or the record thereof, or a certified copy of any such certificate, report, determination or record, shall be prima facie evidence of the facts recited therein and of the title to the property therein described or referred to in the township, county or state, as the case may be, and of the right of the commissioners to take the same for public highway purposes.

SEC. 23. The provisions of this chapter shall be deemed to extend to and include the right to acquire and take property and property rights held, reserved, owned, used or occupied by any cemetery association or municipality, or by any person, firm, society, association or corporation for cemetery or municipal purposes; to acquire

and take property desired by the commissioner or commissioners to exchange for other property which in his or their opinion it is necessary to acquire for public highway purposes, whenever he or they have agreed in writing with the owner or owners of such property for such exchange; and to acquire and take the fee to the whole of a particular lot or parcel of land whenever the portion thereof that is actually needed is such a proportion of the whole as to, in the opinion of the commissioner or commisisoners, practically destroy the value of what would be left as a single lot or parcel of land.

SEC. 24. Whenever the whole of a lot or parcel of land is, or has been, taken by any commissioner or commissioners, as provided in the preceding section, such commissioner or commissioners, or his or their successor or successors in office shall have the right, and are hereby authorized, to sell the portion not needed, on whatever terms such commissioner or commissioners may deem proper.

SEC. 25. If any proceeding to condemn property for highway purposes be pending at the time this act takes effect, the same shall not abate or be discontinued by reason of this act, but the commissioner or commissioners having the matter in charge, may, if the proceeding be one for which the provisions of this act are applicable, prepare, file and serve a determination as hereinabove provided for, and thereupon such commissioner or commissioners may take possession of the property as herein provided, and such proceeding shall be continued as though commenced under this act in the first instance, both as to the procedure to be taken and as to the determination of damages to be paid as compensation for the taking of the property for public highway purposes.

SEC. 26. Should any section or part of a section of this act be held to be invalid for any reason, such invalidity shall not be held to impair or invalidate the remainder of this act, or any part of it, it being the legislative intent that every section and part hereof shall stand and be in force and effect notwithstanding the invalidity of any particular provision or provisions.

SEC. 27. Any proceeding taken under the provisions

of this act shall be subject to review upon certiorari. The procedure therefor shall be the same as is required in case of certiorari to review judgments rendered by judges of the circuit courts: *Provided*, That the application for certiorari must be filed within twenty days after the report of the court commissioners shall have been confirmed.

This act is ordered to take immediate effect.

Approved May 27, 1925.

Act No. 92 of 1927

AN ACT to amend sections one, two, three, four, six, eight, eleven, twenty-three and twenty-seven of act number three hundred fifty-two of the public acts of nineteen hundred twenty-five, entitled "An act to provide for the purchase and condemnation of private property for public highway purposes," approved May twenty-seventh, nineteen hundred twenty-five, and to add thereto a new section to stand as section twenty-eight.

The People of the State of Michigan enact:

SECTION 1. Sections one, two, three, four, six, eight, eleven, twenty-three and twenty-seven of act number three hundred fifty-two of the public acts of nineteen hundred twenty-five, entitled "An act to provide for the purchase and condemnation of private property for public highway purposes", approved May twenty-seventh, nineteen hundred twenty-five, are hereby amended, and a new section is hereby added to stand as section twenty-eight, said amended and added sections to read as follows:

SEC. 1. Township highway commissioners, by and with the approval of their respective township boards, boards of county road commissioners, and the state highway commissioner are hereby authorized and empowered to secure by gift or purchase from the owners thereof:

(a) Property for the right of way for any road to be laid out, altered, or widened, or for changing the line thereof;

(b) Gravel, rock, sand, dirt and any and all other materials that may be needed for the proper construction, improvement or maintenance of a road;

(c) Property deemed by the commissioner or commissioners to be necessary to give to persons using a road a clear view of approaching persons and vehicles, cars, trains and other instruments of travel, at any intersection of a road with another road or with a railroad or railway track;

(d) Property deemed by the commissioner or commissioners to be necessary to change the channel of any water course, natural or artificial, in order to maintain a proper alignment of any road without crossing such water course and the riparian rights of any person, firm or corporation in or pertaining to any such water course;

(e) The fee or any lesser estate in land abutting on any highway right of way and deemed by the commissioner or commissioners to be necessary for the storage of road machinery, equipment or materials;

(f) Any and all other property and property rights deemed by the commissioner or commissioners having jurisdiction over a road to be necessary for the proper construction, improvement or maintenance thereof;

(g) The state highway commissioner and boards of county road commissioners are authorized and empowered to take property and property rights under the provisions of this act within the limits of any incorporated city or village in this state: *Provided, however,* That before any proceedings are taken under this act involving the taking of any property or property rights in any city or village for the changing, altering, opening or widening of any street or highway, said street or highway shall be taken over as county road or designated as a state trunk line road or federal aid road, as the case may be, and the consent of the village or city council by resolution to so take over or designate said street or highway as a county road or state trunk line road or federal aid road shall be first obtained.

SEC. 2. Property for a township road shall be secured by the township highway commissioner and shall be taken in the name of the township. Property for a county road shall be secured by the board of county road commissioners and shall be taken in the name of the county. Property for trunk line highway purposes shall be secured by the state highway commissioner and shall be taken in the name of the state. Excepting in those cases where excess property is taken for highway purposes such property shall be taken in the name of the state highway commissioner. Property for right of way shall be acquired by a release duly executed by the owner or owners of the lands and acknowledged and witnessed in the manner provided by law for the acknowledging and witnessing of deeds. All such releases shall be recorded in the office of the register of deeds of the county in which the land is situated.

SEC. 3. Property for road purposes shall be paid for by the commissioner or commissioners out of any funds under their control, available for that purpose.

SEC. 4. Whenever the commissioner or commissioners shall be unable to agree with any person interested in any such property for the purchase thereof, or whenever such person shall be unknown or a non-resident of the county, or a minor or an insane or incompetent person, the commissioner or commissioners may make a written determination of the necessity of the particular road construction, improvement or maintenance project for which such property is desired, the necessity for taking the particular property described and the damages which, in the opinion of the commissioner or commissioners, should be paid as compensation for the taking of each parcel of such property. Such determination shall also describe the property desired and shall give the name of each person interested therein, so far as known to the commissioner or commissioners making the determination. The declaration of the commissioner or commissioners that he or they have been unable to agree with the owner, or owners, for the purchase of such property and his or their determination of the necessity of the project and of taking the particular property de-

scribed therefor, shall not thereafter be questioned: ***Provided,*** That no such determination shall be made except after a hearing, of which written notice shall be given of the time and place for such hearing to all persons interested so far as known in the property desired, at least seven days before the time of hearing, such notice to be served in any of the following ways:

(a) Personally, or

(b) By leaving a copy at the residence of the person or persons interested, or

(c) By mailing a copy thereof by registered mail addressed to the last known postoffice address of each person or persons so far as known, and by publication in some newspaper printed or circulated in the county in which such lands are located at least seven days prior to date of hearing, or

(d) In case of non-residents, by posting copies thereof in five conspicuous places in the township, one of which shall be on the property: And *provided further,* That any person feeling himself aggrieved by any determination of a township highway commissioner may, within five days after such determination, appeal therefrom to the township board in the manner that appeals are or may be taken from determinations of township highway commissioners relative to laying out a new road; and when any such appeal shall be taken the determination of the township highway commissioner shall not be of any force or effect unless and until the same be confirmed by the township board on such appeal.

SEC. 6. Upon the filing of such determination and proof of payment or deposit as above provided, the commissioner or commissioners having the matter in charge shall give notice thereof to the owners or occupants of the property therein described, which notice may be served either personally or by mailing the same to the last known postoffice address of the person or persons to be served, and shall state that the said commissioner or commissioners are about to take possession of said property for the public highway purposes in said determination stated, and may also contain a notice to the owners or occupants of such property to remove their fence or

fences and other obstructions and encroachments within ten days thereafter. Upon the filing of such determination and the giving of such notice, as aforesaid, the title, and the right of possession to all of the property and property rights described in the determination shall vest in the township, county or state, as the case may be, for the purpose or purposes therein stated, and in case the owners or occupants thereof shall neglect or refuse to remove their fence, fences and other obstructions and encroachments within ten days, the commissioner or commissioners shall have full power, and it shall be their duty to enter upon the premises with such aid and assistance as shall be necessary and remove such fence or fences, obstructions or encroachments without delay: *Provided*, That no person interested as owner, or otherwise, in any of the property described in such determination, shall be required to vacate any lands or premises or move any dwelling house or other building until after the damages to be paid as compensation, for the taking of such property, have been determined and paid or tendered.

Sec. 8. Upon the filing of the petition, the court shall make an order fixing a day for the hearing on such petition, which shall be not less than fifteen days thereafter. Such order shall recite the names of the persons mentioned in the petition and the descriptions of each piece or parcel of property and shall state the purpose of the petition. A copy of such order shall be served, at least ten days before the day of hearing, upon each person named therein as being interested in the property to be taken, who is a resident of the county in which the property is located, and also upon the person or persons in possession of such property if it is in the possession of any person or persons other than the owner. Such service may be made personally or by leaving at the place of residence of the person to be served. Service may also be made upon persons interested in the property who are non-residents of the county.

Sec. 11. Such order shall be published in some newspaper published and circulated in the county, or in such other paper as the court may direct, at least twice within

fifteen days prior to the day of hearing, and a copy of such order shall be mailed to each absent or non-resident person at his last known postoffice address, by registered mail, and a return receipt demanded. Proof by affidavit shall be made of such mailing, and whether or not a return receipt was received, and if one was received, it shall be attached to said affidavit; but such publication and mailing shall not be necessary in any case in which a copy of such order has been served on each such absent or non-resident person.

SEC. 23. The provisions of this chapter shall be deemed to extend to and include the right to acquire and take property and property rights held, reserved, owned, used or occupied by any cemetery association or municipality, or by any person, firm, society, association or corporation for cemetery or municipal purposes; to acquire and take property desired by the commissioner or commissioners to exchange for other property which in his or their opinion it is necessary to acquire for public highway purposes, whenever he or they have agreed in writing with the owner or owners of such property for such exchange; and to acquire and take the fee to the whole of a particular lot or parcel of land whenever in the opinion of the commissioner or commissioners it is advisable to provide for the proper construction, improvement or maintenance of public highways.

SEC. 27. Any proceeding taken under the provisions of this act shall be subject to review upon certiorari. The procedure therefor shall be the same as is required in case of certiorari to review judgments rendered by judges of the circuit courts: *Provided*, That the application for certiorari must be filed within twenty days after the report of the court commissioners shall have been confirmed: And *provided further*, That the determination of necessity provided in section four of this act may be reviewed by certiorari within ten days after such determination of necessity and the procedure shall be the same as review of judgments rendered by a justice of the peace, except that such certiorari may be heard by the court during term or at chambers upon five days' notice given to the opposing party.

SEC. 28. Any act or proceeding herein directed or authorized to be performed or conducted by the state highway commissioner may be done by said state highway commissioner in person, or by one of his deputies; or the state highway commissioner may generally or specifically deputize any person to hold or conduct any hearing directed by this act and said deputized person shall report his conclusions and recommendations to the state highway commissioner, who shall then make his determination thereon. Any action by such deputy, or any hearing or other proceeding conducted by him shall be deemed to be for the purpose of this act, and have the same legal force and significance as though personally performed by the said state highway commissioner.

This act is ordered to take immediate effect.

Approved April 30, 1927.

[No. 215.]

AN ACT to authorize and empower the state highway commissioner to purchase or condemn property to exchange for the right of way, or a part thereof, of railroads, and railways, when such right of way, or part thereof, is necessary to be acquired for widening, straightening, altering or otherwise improving a trunk line highway, and to make such exchange.

The People of the State of Michigan enact:

SECTION 1. Whenever the line of any railroad or railway company is upon or adjacent to the right of way of a trunk line highway and such right of way or any part thereof, is necessary to be acquired for widening, straightening, altering or otherwise improving such highway, the state highway commissioner shall be authorized to enter into negotiations with such railroad or railway company for the purchase of said right of way, or of any part thereof, and to enter into an agree-

ment with any such railroad or railway company to exchange other designated property for such right of way, or for any part thereof, whenever such other designated property shall be acquired by him; and whenever any such agreement has been entered into, the said state highway commissioner shall be authorized and he is hereby empowered to acquire such other property by purchase or condemnation, and when acquired to execute the necessary conveyances and releases thereof to such railroad or railway company for its use, and to take in exchange therefor the railroad or railway right of way or part thereof for such public highway purposes in accordance with such agreement.

SEC. 2. The procedure that is, or may be, prescribed for condemnation proceedings instituted by boards of county road commissioners or the procedure that is, or may be, provided for the condemnation by state agencies and public corporations of private property for the use or benefit of the public, is hereby expressly made applicable to any proceeding brought by the state highway Commissioner under the provisions of this act.

SEC. 3. Whenever any property shall be acquired by the state highway commissioner under and by virtue of the provisions of this act, the consideration or compensation to be paid therefor shall be paid out of the state highway fund in five equal annual installments.

This act is ordered to take immediate effect.

Approved May 6, 1925.

CONTRACT BETWEEN STATE AND RAILWAY

Act No. 340 of 1927

AN ACT to authorize the state of Michigan to contract with the Detroit, Grand Haven & Milwaukee railway company for the surrender of its special charter; for acquiring by the state of a new right of way for said railroad company of approximately nine and one-tenth miles in length in Oakland county, including lands for

station grounds and facilities at Birmingham; for the exchange of said new right of way and additional lands for said railroad company's present right of way and grounds adjacent to and in proximity to state trunk line highway number ten, known as Woodward avenue; for advancing the money to said railroad company to defray the cost and expense of grading said new right of way for a double track railroad; for the construction thereon of a single track railroad; for the connection of said new single track railroad with the present railroad tracks of said railroad company; for making grade separations; the reimbursement of the state by said railroad company for the money to be paid, laid out and expended by the stat in acquiring said new right of way and additional land for said railroad company, and for the money to be advanced by the state in the first instance to said railroad company to defray the cost and expense incurred by the state under said contract; the surrender of the special charter of said railroad company; its reincorporation under the general railroad law of the state, and the payment of taxes by it after its reincorporation; to prescribe the manner of executing said contract, to create a revolving fund to carry out the terms and conditions of said contract; to provide for the disposition of said revolving fund; and to authorize the state to acquire, as a state project, by purchase or condemnation, for highway purposes, a right of way not to exceed seventy feet in width along and adjacent and/or parallel to either or both sides of the new railroad right of way as a part of the proposed relocation and improvement, where and when deemed advantageous and/or necessary by the state administrative board.

The People of the State of Michigan enact:

SECTION 1. The governor of the state of Michigan is hereby authorized and empowered to negotiate with the Detroit, Grand Haven & Milwaukee railway company for a surrender of its special charter; its reincorporation under the general railroad laws of the state, and its tax-

ation in accordance with the general laws of this state providing for the taxation of railroad companies; to acquire or cause to be acquired by the state highway commissioner, a new right of way for said railroad company approximately nine and one-tenth miles in length, in Oakland county, Michigan. The governor, secretary of state and state highway commissioner are authorized and empowered to convey said new right of way to be acquired by the state of Michigan, on behalf of said state, to said railroad company; to make, execute and deliver proper deed or deeds of conveyance for the same in consideration of the release by said railroad company, and the transfer and conveyance by it to the state of Michigan of the right of way now occupied by said railroad company between mile post number thirteen and mile post number twenty-two and one-tenth adjacent to trunk line number ten in Oakland county as provided in the form of contract annexed hereto and made a part hereof, so that the right of way of said trunk line highway number ten, known as Woodward avenue, may be widened to a width of two hundred feet for a distance of approximately nine and one-tenth miles in accordance with said contract. The state highway commissioner is hereby authorized and empowered to acquire by purchase or condemnation, as a state project, a right of way not to exceed seventy feet in width along and adjacent and/or parallel to either or both sides of the new railroad right of way as a part of the proposed relocation and improvement where and when deemed advantageous and/or necessary by the state administrative board.

SEC. 2. In case said contract shall be successfully negotiated, then and in such case there shall be created on behalf of the state, a revolving fund into which the state administrative board or its successors in authority shall pay or cause to be paid such sum or sums of money as shall from time to time in its opinion be necessary to pay, for acquiring the new right of way and additional lands necessary to carry out said contract, and to pay said railroad company for the performance of the work and the furnishing of the materials as provided in said contract; the state administrative board is authorized

and empowered to loan to said revolving fund on the security of said contract, any such sum or sums of money as shall or may be necessary from the sinking fund created to retire state highway bonds; such loan or loans to pay interest at the rate of four and three-tenths per cent per annum. Such interest to be charged against and to be a first lien on and payable out of any moneys in the state highway fund not otherwise specifically appropriated, and shall be charged against the cost and expense of widening and improving said trunk line highway number ten, known as Woodward avenue. All payments which shall or may be made by the Detroit, Grand Haven & Milwaukee railway company under and in pursuance of said contract to reimburse the state for moneys advanced by it and paid, laid out and expended by it, or by said railroad company from moneys advanced by the state in the first instance, shall be paid into said revolving fund until all of the expenditures required to be made by the state and the state highway commissioner in the first instance under said contract shall have been made, and the obligations thereby created shall have been paid, and all loans to said revolving funds or moneys from the highway bond sinking fund shall have been fully paid.

SEC. 3. When the moneys which shall have been advanced in the first instance by the state in pursuance of said contract to said railroad company, and all moneys expended by the state or the state highway commissioner for which the state or the state highway commissioner is to be reimbursed by said railroad company under the terms of said contract, through said revolving fund shall have been fully paid by said railroad company to the state in accordance with the terms and conditions of said contract, then such moneys shall be retransferred by the state administrative board, or its successor in authority, from said revolving fund to be created, to the funds belonging to the state from which the same were taken in the first instance.

SEC. 4. The changes and improvements contemplated by this act and said proposed contract, and the taking of the lands described in said contract for the new right

of way of said railroad company, including the additional lands described therein necessary for depot and yard purposes at Birmingham and all other lands necessary or required to carry out this act and said proposed contract, are hereby declared to be a public necessity, and the state highway commissioner is hereby authorized and empowered to acquire the same on behalf of the state by purchase or condemnation, in accordance with the general laws of the state of Michigan.

SEC. 5. The deed or deeds of conveyance of the new right of way for said railroad to be acquired by the state, and of such additional lands as shall be necessary to be acquired in accordance with said contract for station grounds and other purposes at Birmingham as specified in said contract, are to be conveyed by the state to said railroad company for railroad purposes; and the deed or deeds for the same shall be executed on behalf of the state by the governor and attested by the secretary of state and approved by the state highway commissioner.

SEC. 6. Said contract when made and entered into by the parties thereto and properly executed as provided therein, shall be valid and binding upon the parties thereto, their successors and assigns, conditioned however, upon the faithful performance of the terms and conditions thereof by the parties thereto.

SEC. 7. Said contract shall provide that when the terms and conditions thereof shall have been carried out, said Detroit, Grand Haven & Milwaukee railway company shall surrender its special charter, reincorporate under the general laws of the state of Michigan providing for the organization of railroad companies, and thereafter pay taxes without discrimination under the general laws of this state providing for the taxation of the property of railroad companies.

SEC. 8. Said contract shall provide that the railroad company shall repay to the state of Michigan all money advanced by the state of Michigan or the state highway commissioner in acquiring the right of way for said railroad company and in paying said railroad company, in the first instance, for doing and performing the work and in furnishing the materials contracted by it to be

performed and furnished, at the times and in the amounts and in the manner following: On the thirty-first day of December, in the year that the state shall have acquired control of the new right of way herein provided to be procured, the railroad company shall pay to the state the sum of two hundred fifty thousand dollars, and on each succeeding thirty-first day of December thereafter the further sum of two hundred fifty thousand dollars: *Provided, however,* That when the actual cost of carrying out said contract in its entirety shall have been ascertained, then the railroad company shall pay to the state a sum equal to one-fifteenth of said total actual cost, plus or minus the amount of over-payment or under-payment that shall have been made by said railroad company: And *provided further,* That said railroad company shall repay to the state all of the money paid, laid out and expended under the terms and provisions of said agreement within fifteen years after the first payment by it made, as herein provided. Said contract shall provide that no interest charge shall be made or accepted by the state on account thereof, except on past due installments, if any, and then at the rate of five per cent per annum.

SEC. 9. The governor, for and on behalf of the state of Michigan, is hereby authorized to make such modifications in said contract as shall be provided for therein and the money necessarily paid out and expended in making the changes provided for in such modifications shall, in the first instance, be advanced by the state and the state shall be reimbursed therefor by the railroad company, in accordance with the terms of said contract.

SEC. 10. The form of said proposed contract between the state of Michigan and said railroad company is as follows:

THIS CONTRACT AND AGREEMENT, made and entered into by and between THE DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY, party of the first part, hereinafter called the "Railway Company," and THE STATE OF MICHIGAN, party of the second part, hereinafter referred to as the "State," WITNESSETH as follows:

Whereas, The Detroit, Grand Haven and Milwaukee railway company is a corporation organized and existing under and by virtue of a special charter granted by the territorial council of the territory of Michigan, March seven, eighteen hundred thirty-four, and acts amendatory thereof and supplementary thereto, under which said statutory special charter said railway company pays annually a fixed percentage of its capital stock paid in as taxes to the state, and at the present time is paying annually twenty-five thousand one hundred seventy-one dollars and forty cents ($25,171.40); and

Whereas, The validity of said special charter of said railway company has been attacked from time to time by the state, in the courts of this state, and the validity of said special charter has been upheld by the supreme court of this state, and the supreme court of the United States; and

Whereas, The State of Michigan has for many years sought to procure the surrender of all of the special charters of all of the railroad companies in the state of Michigan, and to have said railroad companies incorporate under the general laws of the state of Michigan providing for the organization and incorporation of railroad companies and to pay the same rate of taxes to the state upon the true cash value of their taxable property, but that the said railway company has refused to surrender its special charter and to incorporate under the general railroad law, and to pay taxes upon the value of its taxable property in accordance with the general law of said state providing for the taxation of the property of railroad companies; and

Whereas, The state is desirous of acquiring the right of way of said railway company extending from the railway company's mile post number thirteen in Royal Oak to the railway company's mile post number twenty-two and one-tenth between Pontiac and Birmingham, for the purpose of enabling the state to carry out its highway program, and to widen to two hundred feet the right of way of the public highway running substantially parallel to said right of way of said railway company, and known as Woodward avenue, and to have said railway company

remove its tracks and equipment from said right of way; and

Whereas, Said railway company executed in its own behalf by its president, attested by its secretary, a contract, which said contract was submitted to the legislature of the state of Michigan for its ratification and approval, at the extra session of the legislature convened in nineteen hundred twenty-six; and

Whereas, The legislature of the state, by act number one, of the public acts of the extra session of nineteen hundred twenty-six, approved in all respects said contract, and authorized the governor and the state highway commissioner to execute the same upon the part of the state of Michigan, attested by the secretary of state; and

Whereas, After said contract was so executed on behalf of the said railway company and submitted to the legislature of the state and approved by it, and the governor and the state highway commissioner were authorized to execute the same on behalf of said state, to be attested by the secretary of state, said contract was materially changed from the terms of the contract executed by said railway company and submitted to the legislature of the state; and

Whereas, The plans and specifications attached to the contract executed on behalf of said railway company and on behalf of the state on September two, nineteen hundred twenty-six, were altered and amended subsequent to the passage by the legislature of the state and the approval by the governor, of act number one, of the public acts of the extra session of nineteen hundred twenty-six, and that by reason of the changes made in material parts of said contract after the approval of same by the legislature by act number one of the public acts of the extra session of nineteen hundred twenty-six, said contract is claimed by the state of Michigan to be of doubtful validity, although the railway company does not admit any such invalidity, said amendments, additions and alterations made in and to said contract not having been ratified by the legislature of the state, and both parties to said contract desiring to obviate, as far as possible, any question of the validity of the same which might or could

be raised on account of such modifications subsequent to its ratification and approval by the legislature of the state; and

Whereas, Said railway company and the state have entered into negotiations which have resulted in the making of a new contract and agreement and the setting aside and cancellation of the contract and agreement made and entered into on September two, nineteen hundred twenty-six, and on file in the office of the secretary of the state of the state of Michigan, subject to the ratification and approval of the same by the legislature of the state of Michigan and by the board of directors of said railway company;

Now, therefore, It is hereby agreed by and between the said railway company, party of the first part, and the state of Michigan, party of the second part, as follows:

1.

That the contract and agreement heretofore made and entered into under date of September two, nineteen hundred twenty-six, and filed in the office of the secretary of state of the state of Michigan on the third day of September, nineteen hundred twenty-six, whether valid or invalid, be and the same is hereby cancelled, set aside and held for naught, on the approval of this contract by the legislature and its execution as herein contemplated.

2.

That the state of Michigan shall, upon the ratification, approval and execution of this contract by the parties thereto, as required by law, proceed with all convenient speed to procure or cause to be procured, a new right of way one hundred feet wide for said railway company for the purpose of constructing thereon a new double track railroad, as and where provided in this contract, and the state shall, in the first instance, advance the money to defray the expense of procuring the same.

3.

Immediately after the ratification, approval and exe-

cution of this contract by the respective parties thereto as herein provided, said railway company shall, upon the new right of way being procured by the state, at once take charge of and construct with all convenient speed upon said new right of way so to be procured, a single track railroad, together with the necessary grade separations and approaches, sidetracks, switches, incidents and appurtenances, in accordance with the plans and specifications annexed to the contract made and entered into September two, nineteen hundred twenty-six, between the parties hereto and filed in the office of secretary of the state of Michigan on September three, nineteen hundred twenty-six, which plans, specifications and blueprints are made a part hereof, except as herein modified or as they shall hereafter be modified as provided herein.

4.

That said railway company, upon the completion of its railroad upon said new right of way, shall remove its railroad tracks and equipment from the old right of way now occupied by it between the points herein designated, and the state, upon the removal of said tracks and equipment of said railway company by said railway company from said right of way, may at once take possession of the same and use and improve the same, including the railway company's present right of way through Birmingham, for highway purposes, and said railway company agrees to make, execute and deliver to the state all such deeds, releases and conveyances as shall or may be deemed necessary, requisite and proper to convey the same to the state, but there shall not be conveyed to the state, by the railway company any lands between said points other than its old right of way, and such parts of other lands owned by said railway company as shall be necessary to be acquired by the state to widen said Woodward avenue to a width of two hundred (200) feet.

5.

Upon the carrying out of this contract, and the removal of said railway tracks by said railway company

from the old right of way to the new right of way, or the building of new tracks on said new right of way by the railway company, and the payment to the state of Michigan by said railway company in full for the cost and expense incurred by the state under this contract, said railway company shall forthwith surrender its special charter and any and all rights which it now has or claims to have thereunder, and incorporate under the general laws of the state providing for the incorporation of railroad companies, and transfer any and all assets of said railway company as it exists under said special charter, together with all additions to and replacements of its property, to said railway company to be incorporated under the general laws of the state providing for the incorporation of railroad companies. That said railway company shall, upon the surrender of its special charter as above set forth, thereafter be assessed for taxes in the state of Michigan, without discrimination, under the general tax laws in force in said state, from time to time, providing for the taxation of the property of railroad companies.

6.

The deed or deeds of conveyance from the persons owning the lands to be acquired by the state for the new right of way of said railway company, shall be taken in the name of the state of Michigan, and when the state shall have acquired the title to all of said right of way and said railway company shall have completed the work to be by it done under this contract, the same shall be conveyed by the state to said railway company, and the governor of the state of Michigan is hereby authorized and empowered to make, execute and deliver said deed or deeds of conveyance on behalf of the state, the same to be attested by the secretary of state of the state of Michigan, and acknowledged by them and each of them under the great seal of the state.

7.

The railroad company shall repay to the state of Michigan all money advanced by the state, or the state highway

commissioner, in acquiring the right of way for said railroad company and in paying said railroad company, in the first instance, for doing and performing the work and in furnishing the materials contracted by it to be performed and furnished at the times and in the amounts and in the manner following: On the thirty-first day of December, in the year that the state shall have acquired control of the new right of way herein provided to be procured, the railroad company shall pay to the state the sum of two hundred fifty thousand dollars, and on each succeeding thirty-first day of December thereafter the further sum of two hundred fifty thousand dollars: *Provided, however,* That when the actual cost of carrying out said contract in its entirety shall have been ascertained, then the railroad company shall pay to the state a sum equal to one-fifteenth of said total actual cost, plus or minus the amount of over-payment or under-payment that shall have been made by said railroad company: And *provided further,* That said railroad company shall repay to the state all the money paid, laid out and expended under the terms and provisions of said agreement within fifteen years after the first payment by it made, as herein provided. It is expressly understood and agreed that no interest charge shall be made or accepted by the state on account thereof, except on past due installments, if any, and then at the rate of five per cent per annum.

8.

The state, acting through its state highway commissioner and with the assistance of the railway company, agrees, at its entire initial expense, but to be fully repaid as hereinafter provided, to acquire by purchase, condemnation or otherwise a one hundred foot right of way, hereinafter referred to as the new right of way, together with such additional width as and where necessary to provide for proper cuts, fills and drainage for the proper development of said one hundred foot right of way for railroad purposes, between the aforesaid points, on the route designated on the blueprints, dated October four, nineteen hundred twenty-six, identified by the signature

of the state highway commissioner and the chief engineer of the railway company, which are on file with the parties hereto and which are hereby made a part hereof, it being understood that the portion of the old right of way at or near said mile post thirteen, which lies within the new right of way, shall continue as part of the latter, and that the portion of the old right of way from said mile post twenty-two and one-tenth to mile post twenty-one and thirty-five one-hundredths which lies within the new right of way, shall continue as part of the latter; also to likewise acquire the necessary additional land for station grounds at Birmingham, on the altered and relocated route, including that necessary for depot, freight house, team tracks, passing tracks, and other usual and necessary appurtenances, such additional land to be four thousand feet in length and approximately three hundred feet in width, including said one hundred foot right of way, as indicated on said blueprints.

(a) It is understood and agreed that the acquisition of said new right of way and other lands shall be promptly commenced, prosecuted and completed, and that such acquisition shall be under the joint supervision of the state highway commissioner and the said railway company's chief engineer; they shall jointly appoint competent agent or agents to conduct the negotiations for such right of way and other lands, and shall have full authority to fix the compensation of such agent or agents, and to discharge them at any time. No purchases shall be made except on the joint approval, in writing, of said state highway commissioner and chief engineer, and should either disapprove of the price of any proposed purchase, then the same shall not be concluded, but the land therein involved shall be acquired by condemnation. When condemnation is necessary, proceedings therefor shall be instituted and conducted in behalf of the state, by its proper officers, but with the right in the railway company, through its attorney or attorneys and other representatives, to participate in such proceedings. All expenses involved in such acquisition, including detailed surveys and map work, therefor, shall be considered and treated as a part of the cost thereof, except that there

shall not be included in such expenses any allowance for the services of the said state highway commissioner or chief engineer, or the attorneys for the parties.

(b) If the state highway commissioner, in the purchase of said new right of way and other lands, finds it expedient or necessary to purchase more land, adjacent to any part thereof, than may be actually required, it is understood and agree that he may do so, provided such purchase shall be approved, in writing, by the said railway company's chief engineer, and that the cost of such additional land shall be considered and treated as a part of the cost hereunder, and that the surplus land, either the whole or any part thereof, shall be disposed of on the best terms obtainable, at such time or times as the state highway commissioner and said chief engineer may deem expedient, if such disposition is prior to the making and delivery of the exchange deeds herein provided for, the state highway commissioner and said chief engineer to approve, in writing, each and every proposed disposition thereof, and the net proceeds thereof shall be credited to the cost hereunder. If such disposition of any part of such surplus lands has not been made prior to such exchange deeds, then any remaining portion thereof shall be included in the deed to the railway company, and it shall thereafter be the sole owner thereof.

(c) Evidences of good, merchantable title to said new right of way, and other land, in the form of abstracts or otherwise, shall, from time to time, as said right of way and other land is acquired, be furnished by the state highway commissioner to the railway company, and the cost and expense thereof shall be deemed a part of the cost of said right of way.

9.

The railway company agrees, at the entire initial expense of the state, but to be fully repaid, as hereinafter provided, to itself do, or cause to be done by letting on contract to a contractor or contractors, all the work, including the furnishing of all materials for the grading of said new right of way, for a double track railroad, in-

cluding all necessary drainage structures; also including the separating of the grades and crossing protection at the railroad crossings specified in general plans herein mentioned; also including the construction on said new right of way of a single track railroad, with necessary appurtenances, including construction on new right of way of telegraph pole lines and wires and other telegraph facilities of like kind as those now existing on old right of way; and also including facilities on new station grounds at Birmingham of like kind as those now existing on old station grounds, all on the grade and according to the general plans and specifications annexed to the contract dated September second, nineteen hundred twenty-six, and filed in the office of the secretary of state, September third, nineteen hundred twenty-six; detailed plans and specifications to be prepared by the railway company as the work progresses, the expense thereof to be considered and treated as part of the cost of the work hereunder, all to be of the standard of first class for a modern railroad, not less than required by law; said work to be commenced and prosecuted with reasonable diligence after the new right of way has been acquired: *Provided,* That the railway company, at its option, may, before said new right of way has been fully acquired, commence and prosecute such work in any section where sufficient of the new right of way has been acquired to permit of expenditious and economical work.

(a) It is understood and agreed that the state highway commissioner, with the assistance of the railway company, shall procure any and all necessary public approval of the work to be done hereunder; and that the railway company, with the assistance of the state, shall procure any and all necessary approval from the interstate commerce commission for the abandonment of its old rights of way and relocation on its new right of way; and that any damages and/or expenses arising out of the carrying out of this contract shall be considered and treated as a part of the cost thereof.

(b) When the single track with appurtenances has been constructed as aforesaid, the railway company shall physically connect the same with its railroad at said mile

posts thirteen and twenty-two and one-tenth, the expense thereof to be considered and treated as part of the cost of the work hereunder.

(c) It is understood that it shall be optional with the railway company to itself perform any or all of the work hereby provided for, or to let the same on contract to a contractor or contractors. As to work which the railway company elects to let to a contractor, it shall procure proper bids of contractors, and will award the work to contractor or contractors at prices which shall first have been approved, in writing, by the state highway commissioner; and will make the necessary contract or contracts with the contractor or contractors, and pay for the work and materials by monthly estimates.

(d) It is understood and agreed that the railway company shall appoint a competent engineer to have general charge and supervision of the work herein provided for, both that performed by the railway company itself, and that performed by contractors, subject to the provisions hereof, and that he shall have authority to employ necessary assistants, including inspectors, and that the expense of such engineer, assistants and inspectors, including salaries or wages, field office, supplies, or any other items necessarily incident to said work, shall be considered and treated as a part of the cost of the work.

(e) It is understood and agreed that, as to work performed by the railway company itself, there shall be added to the cost of all materials furnished by it from stock to accomplish such work, fifteen per cent to cover the expenses of handling in transit, freight charges accruing on materials (the shipment of which originates on lines of railway companies comprising the Grand Trunk railway system), accounting, and other like overhead expenses which it is impracticable to allocate; it being understood that all other materials shipped for use in such work are to be purchased f. o. b. Royal Oak or Birmingham, for delivery at such place there as may be designated by the railway company, and said fifteen per cent shall not apply to any material so purchased.

(f) To the cost of all labor, performed by the railway company itself, including foremen, there shall be added

ten per cent to cover the cost of accounting, use of small tools, and other like overhead expenses, which it is impracticable to allocate.

(g) It is further understood and agreed that, as to work performed by contractors for the railway company and as to materials purchased f. o. b. Royal Oak or Birmingham, as aforesaid, there shall be added to the cost thereof, as fixed by contract, one per cent to cover the cost of advertising for bids, letting contracts, accounting, and other like overhead expenses which it is impracticable to allocate.

(h) It is further understood that the railway company will be required to furnish certain equipment for use in such work, and it is agreed that for equipment owned or controlled by it, or by companies comprising the Grand Trunk railway system, rental may be charged, and included in the cost of the work, such rental to be reasonable and according to the prevailing charges for like or similar purposes, and also other expenses contracted therewith, as well as the actual rental and other expenses paid for equipment leased from outside parties.

(i) The railway company shall monthly render to the state highway commissioner, acting for the state, bills covering the cost to it for the preceding month, including all expenditures made hereunder, which are chargeable to the cost of the work, whether for work by itself performed, or for work performed by contractors for it, according to estimates to be made by the railway company's chief engineer, the state highway commissioner or his representatives to have access to all the railway company's records pertaining to such work for the purposes of checking the same, and the state agrees to pay such monthly bills within thirty days from the date of rendition; if not paid within thirty days after rendition, said bill or bills shall bear interest at the rate of five per cent per annum until paid; and said bills, together with accrued interest thereon, shall be deductible from the next succeeding annual payment or payments under paragraph seven hereof if not paid by the state before such payments become due; such accrued interest, if any, thus deducted shall not be considered and treated as a part of

the cost of the work to be repaid by the railway company under said paragraph seven.

(i) When the construction aforesaid, including the furnishing of the materials, and also including the physical connection of said new single track with the railway company's railroad at mile posts thirteen and twenty-two and one-tenth, as aforesaid, is completed, the railway company shall promptly remove the physical materials, such as rails, ties, etc., from the old right of way, and the fair, net value thereof, with proper allowance for depreciation and expense of removal, as specified in the schedule annexed to the contract dated September second, nineteen hundred twenty-six, and filed in the office of the secretary of state, September third, nineteen hundred twenty-six, shall then be credited to, and deducted from, the total cost incurred by the state hereunder.

10.

This contract shall inure to and be binding upon the respective successors and assigns of the parties hereto, and in event said railway company consolidates with, leases or sells its railroad and other property to any other railroad company, whether of the Grand Trunk railway system, or otherwise, the rights, duties and obligations of the parties hereunder shall run with such railroad and other property without loss or waiver thereby of any of the same, and the consolidated, purchasing or lessee railway company shall hold the same with all rights and obligations pertaining thereto, hereunder, including the obligation and the right to make the payments herein specified without further responsibility for taxes in addition to the annual sum of twenty-five thousand one hundred seventy-one dollars and forty cents ($25,171.40), until the time shall have expired for the making of such payments in full to the state by said railway company, as herein specified; said railway company is not to obtain, however, an extension of the time herein specified, at which it is to come under the general railroad laws of the state for the purposes of taxation, nor be longer exempted from taxation under the general laws of the

state providing for the taxation of railroad companies, by reason of any default in performance, or failure to pay, as herein provided, upon its part.

11.

Should any dispute arise between the parties hereto involving any matters herein it shall be submitted to a committee composed of the governor of the state of Michigan, the president of said railway company, and a third person, to be selected by them. In the event that the governor of the state of Michigan and the president of the Detroit, Grand Haven and Milwaukee railway company shall be unable to agree upon a third arbitrator, the then senior judge of the United States district court, for the eastern district of Michigan, shall select such third arbitrator upon the written application of either party. Said committee shall fix a time and place of hearing, give reasonable notice to the parties, who shall have the right to introduce such evidence and arguments as may be deemed proper, and the decision of a majority of said committee shall be final and conclusive as to the matter submitted to them. The expense of such arbitration shall be borne by the parties hereto equally, provided such committees may, in its discretion, otherwise apportion such expense.

If at any time after the execution, ratification and approval of this contract it shall be deemed necessary and advisable by the state to make additional grade separations along the line of said new right of way, in addition to the grade separations provided for in the plans and specifications herein referred to and made a part of this contract, said additional grade separations shall be made and the expense thereof be paid, as provided by the general laws of the state of Michigan governing the separation of grades at railroad crossings.

13.

The state reserves the right to change or relocate the new right of way herein specified, with the consent of the chief engineer of said railway company, but in case

of such change of location of new right of way, the grade thereof shall conform substantially to the grade herein referred to and provided for, and the cost of securing said right of way and of paying for the same, shall be ascertained, fixed and paid as herein provided, but nothing herein contained, if it may change the total amount to be paid, laid out and expended by the state, shall change, modify or extend the time within which said railway company shall pay and reimburse the state in full for any and all moneys paid, laid out and expended by it in carrying out and performing the terms and conditions of this contract, incumbent on its part to be carried out and performed by it.

14.

This contract and agreement shall not be binding until it shall have been ratified and approved by the legislature of the state of Michigan, signed on behalf of said state by the governor, attested by the secretary of state, under the great seal of the state, and signed by the state highway commissioner, and until the same shall have been executed on behalf of said railway company by its proper officers.

15.

The state, on the carrying out and fulfilling of this contract by the parties hereto expressly abandons and fully relinquishes any right it has, or now claims to have, to purchase or otherwise acquire the railroad and/or other property of the railroad company, under the special charter or otherwise.

In Witness Whereof, The parties hereto have caused this contract to be executed in quadruplicate, in their

corporate names, by their respective duly authorized officials, this.....day of.....A. D. 1927.

STATE OF MICHIGAN

By: .....
Governor

Attest: .....
Secretary of State

.....
State Highway Commissioner

DETROIT, GRAND HAVEN and MILWAUKEE RAILWAY COMPANY

By: .....
President

Attest: .....
Secretary

This act is declared to be immediately necessary for the public health, peace and safety.

This act is ordered to take immediate effect.

Approved June 1, 1927.

RAILWAY CONDEMNATION STATUTES

(160) § 8249. SEC. 15. Whenever any lands are condemned to the public use, by any railroad, bridge or tunnel company, under the provisions of this act, such company shall pay to the owners and others interested in the lands condemned, in addition to the damages and compensation awarded by the commissioners or jury, a reasonable attorney fee, to be fixed and determined by the court when the report or verdict is confirmed, or as soon thereafter as may be, and the attorney fee, so allowed, together with witness fees and other costs and disbursements, to be taxed as in civil actions, shall be paid, tendered, or deposited with the damages or compensation as hereinafter provided, before such company shall have any right to enter upon or take possession of the lands condemned.

(161) § 8250. SEC. 16. In case any of the real estate required by said company for the purposes aforesaid is owned by a person insane, a minor, or otherwise incompetent and under guardianship, and such company and the guardian of such person shall agree upon a price for the same, and enter into a contract in writing therefor, the said guardian shall, upon the approval of the same by the probate court of the county in which the said real estate is situated, convey said real estate, in accordance with the terms of such contract, to said railroad company, and the deed thereof shall be valid in law to convey the title of such person under guardianship to said company, in accordance with the terms of said contract.

(162) § 8251. SEC. 17. In case any railroad, bridge or tunnel company is unable to agree for the purchase of any real estate property or franchises required for the purpose of its incorporation, it shall have the right to acquire title to the same in the manner and by the special proceedings prescribed in this act; but there shall be no power, except for crossing, to take the track or right of way of any other railroad company except when any road-bed or part thereof has for five years remained, or shall hereafter for five years remain in an unfinished condition and without having the ties and iron placed and continued thereon up to the time measures are instituted to appropriate the same as hereinafter authorized, any other railroad corporation shall have the right to acquire title to the same and to the real estate and easements held by such company for use in connection therewith, in the manner prescribed for obtaining other property or franchises required for its use, and in such case proceedings may be instituted in a court of record of any county wherein a part of such road-bed sought to be acquired may be situate, and all of such road-bed and property aforesaid within this state, or only a part thereof at the election of the applicant may be included in one proceeding. Notice of the application shall be given the company or corporation owning or claiming an interest in the road-bed and property mentioned when created under the laws of this state by serving a copy of the peti-

tion and notice hereinafter mentioned personally upon its president, any vice president, superintendent, secretary, treasurer, general manager, or general counsel, if either of them reside within the state, ten days or more prior to the presentation of the same to the court, but if they do not, then service may be made by publication as required by section eighteen of this act, except in such case a description of the property as in this section provided shall be sufficient, and if such company or corporation was not created under the laws of this state, it may be served by delivering such copy of the petition and notice to either of said officers personally at least thirty days previous to presenting such petition to the court, or by publication as required in said section eighteen, except it shall be sufficient to describe the property to be taken as provided in this section. It shall be sufficient in such petition to describe the property sought to be appropriated as the line is designated in the articles of association, or articles amendatory thereof, and by which it was established, and further designating it as the roadbed and property connected therewith of the company or corporation then owning or claiming it whose title is sought to be acquired.

(163) § 8252. Sec. 18. For the purpose of acquiring such title such company may present a petition to any court of record for such county, praying for the appointment of three commissioners. Said petition shall be in the name of the company, shall be signed by one of the directors, or the engineer or the attorney of said company on its behalf, and shall be verified by the oath of the person so signing the same, and shall contain the description of all the real estate, property or franchises, or so much thereof as the company seeks to acquire under such petition in said county; and that said company is duly incorporated; that it has a railroad, railroad bridge or railroad tunnel constructed, specifying the points from and to which the same is in operation, or that it is the intention of said company, in good faith, to construct, finish and maintain a railroad, railroad bridge or railroad tunnel from and to the places named for that purpose in its articles of association; that the

capital stock of the company has been in good faith subscribed as required by this act to organize such company; that the property described in the petition is required for the purpose of constructing, operating or repairing the railroad or its appurtenances, or the railroad bridge or tunnel or its appurtenances, as the case may be; and that the taking thereof is necessary for the public use, and that the company has not been able to acquire title thereto, and the reason of such inability. The petition must also state the names and places of residence of the parties, so far as the same can with reasonable diligence be ascertained, who own, or have, or claim to own or have, estates or interests in said lands or property; and if any such persons are infants, their ages, as near as may be, must be stated, and if any of them are idiots, or persons of unsound mind, or are unknown, it must be so stated, together with such other facts and allegations as to incumbrances or otherwise as will be sufficient to show who have or claim to have interests in said lands, real estate or property, and such other matters as the company may see fit to make. A copy of such petition, with a notice of the time and place when and where the same will be presented to such court, must be served on all persons whose interest will be affected by the proceeding, at least ten days prior to the presentation of the same to the court, as follows, viz.:

First. If the person upon whom service is to be made resides in this state, and is not an infant under the age of fourteen years, idiot or person of unsound mind, service of a copy of such petition and notice must be made on him or his agent or attorney authorized to contract for the sale of real estate described in the petition, personally, or by leaving the same at the usual place of residence of such person or agent, with some person of suitable age; and if he resides out of this state, but has such agent as aforesaid residing in this state, then such service may be made on such agent in the manner aforesaid, or upon him personally out of or within this state; or it may be by publishing a notice stating briefly the object of the application, and giving a description of the land, interest therein, or property to be taken, and in

some paper published in the county in which the said lands or property are situated, if there be one, and if not, then in some weekly paper published in the city of Detroit once in each week for six successive weeks next previous to the presentation of the petition; and if the residence of such person or persons residing out of this state be known, a copy of such petition and notice shall be deposited in the postoffice at least thirty days previous to presenting such petition, directed to such person at his place of residence, as near as may be, postage prepaid;

Second. If any person on whom such service is to be made is a minor under the age of fourteen years, or an idiot or person of unsound mind, and resides in this state, such service shall be made as aforesaid on his guardian, or if none, then on the person who has the care of, or with whom such infant, idiot or person of unsound mind resides;

Third. If the person on whom such service is to be made be unknown, or his residence unknown, then such service may be made by publication for six weeks in the same manner provided in the first subdivision of this section, and the court or judge shall appoint an attorney to appear for and protect the rights of any such person;

Fourth. In case any party to be affected by the proceedings is an infant, idiot or person of unsound mind and has no guardian, the said court, or the judge of said court, shall appoint a special guardian or committee to appear for and attend to the interests of such infant, idiot or person of unsound mind, and all notices to be served in the progress of the proceedings may be served on such special guardian;

Fifth. In all cases not otherwise provided for, service of orders, notices and other papers in the proceedings authorized by this act may be made as the said court or judge may direct.

(164) § 8253. Sec. 19. Whenever the line or road of any company organized under this act shall be in the possession or use of any other railroad company, under any lease, contract, or agreement, for the building or operating the same, under the laws of this state, it shall be competent for the latter company, with the assent and

in the name of the former company, to institute and prosecute proceedings for acquiring title to any land or property for the purposes and under the conditions mentioned in preceding sections. In such case the petition may be signed and verified by a director, engineer or attorney of either company. Whenever any company organized under this act shall be in use or possession of any railroad acquired from another company, by purchase or consolidation, it shall be competent for the company so in possession and use to institute and prosecute condemnation proceedings in its own name, to acquire land or property for railroad purposes, in connection with the railroad so acquired. In such case the petition and proceedings shall, so far as practicable, comply with the general provisions of the statute regulating condemnation proceedings.

(165) § 8254. Sec. 20. On presenting such petition to said court or the judge thereof at chambers, with proof of service of a copy thereof, and due notice as aforesaid, all persons whose estate or interest are to be affected by the proceedings, may show cause against the prayer of the petition, and may disprove any of the facts alleged therein; and said court or judge shall hear the proofs and allegations of the parties; and if no sufficient cause is shown against granting the prayer of the petition, said court or judge shall make an order appointing three disinterested and competent freeholders as commissioners to ascertain and determine the necessity for taking such lands, franchises or other property, and to appraise and determine damages or compensation to be allowed to the owners and persons interested in the real estate or property proposed to be taken in such county for the purposes of the company; and such court or the judge thereof shall fix the time and place for the first meeting of such commissioners: Provided, That any person or persons, or company, whose estate or interest is to be affected by the proceedings, may demand and have from such court, at the time of hearing of said petition, a jury of twelve freeholders of said county to ascertain and determine the necessity for taking such lands, franchises, or other property, and to appraise and

determine the damages or compensation to be allowed therefor. Thereupon the court shall direct the sheriff or any constable of the county, to make a list, in writing, of twenty-four inhabitants of the county, qualified to serve as jurors in the courts of record in this state. Such sheriff or officer shall, before he proceeds to make such list, be sworn by the court or judge to select such persons according to his best judgment, and without favor or partiality to either party. From such list the person or persons demanding such jury may alternately strike off six names, and the railroad company six names, and in case of either of them refusing or neglecting to do so, the judge shall strike off from said list for the party so refusing or neglecting, so as to leave only twelve names thereon. Such court, or the judge thereof, shall issue a venire in the usual form, inserting therein the twelve names so remaining on said list, and requiring such jury to meet at the time and place appointed therefor by the court, which said venire may be served by the sheriff, any constable, or other proper officer of the county, as in other cases; and if at the time and place appointed by said court or judge for said jury to meet, any of the persons named as jurors do not attend, or if any named in the venire, or chosen as talesmen, shall be rejected in a challenge for cause (which right of challenge is hereby granted), it shall be competent for said court, or the judge thereof, to order the said sheriff or other officer to summon immediately as many competent persons as may be necessary, with the persons in attendance as jurors, to furnish a panel of twelve jurors; and if no jury be demanded on the part of any person mentioned in said petition, his or her right to the same shall be deemed to have been waived. In case any parcel of land is owned or occupied by parties having different interests or estates therein or in any part thereof, they may be united as respondents in respect to the same in the petition, and thereafter the proceedings touching the same shall be carried on as one suit. The demand of any one of the respondents for a jury shall be deemed to be a demand for all; and if they shall fail or neglect to unite in striking six names from the jury list, the judge shall

strike off six names for them; and in such cases the jury shall not only determine the entire damages and compensation to be paid for the whole property taken, but shall, in their report, also justly and impartially apportion and award the amounts to be paid to the owner or owners of each estate in the lands so taken.

(166) § 8255. SEC. 21. The commissioners shall take and subscribe the oath prescribed by article eighteen of the constitution.[1] Any of them may issue subpoenas, administer oaths to witnesses, and a majority of them may adjourn the proceedings before them from time to time in their discretion. Whenever they meet, except by appointment of the court or judge, or by previous adjournment, they shall cause reasonable notice of such meeting to be given to the parties who are to be affected by their proceedings, or the attorneys or agents of such parties. They may view the premises described in the petition, and shall hear the proof and allegations of the parties, and shall reduce the testimony, if any is taken by them, to writing, if requested to do so by either party, and after the testimony is closed in such case, and without any unreasonable delays, and before proceeding to the examination of any other claim, all being present and acting, shall ascertain and determine the necessity of taking and using any such real estate or property for the purposes described; and if they deem the same necessary to be taken, they shall ascertain and determine the damages or compensation which ought justly to be made by the company therefor to the party or parties owning or interested in the real estate or property appraised by them. They shall also determine and certify what sum ought to be paid to the general or special guardian of an infant, idiot, or person of unsound mind, or to said court, to be held for an unknown party in interest not personally served with notice of the proceedings and who has not appeared, for damages and cost or expenses and counsel fees. They shall make a report to said court or judge, signed by them, of the proceedings before them, if any, which may be filed with the clerk of the court,

[1]See Const. of 1909, Art. XVI, 2.

either in vacation or term time, or the probate court, as the case may be. Said commissioners shall be entitled to two dollars a day for each day they are engaged in the performance of their duties, to be paid in the first instance by the company. In case a jury shall have been demanded and ordered by the court, pursuant to section twenty-one of this article, the said jury shall proceed to ascertain and determine the necessity of taking and using any such real estate or property, and the damage or compensation to be paid by the company therefor, in the same manner and with like effect as is provided in this section in the case of commissioners, and as is further provided in said section twenty-one; but they shall all be present and act together during the proceedings, and before acting shall take and subscribe an oath that they will justly and impartially ascertain and determine the necessity of taking and using any such real estate or property for the purposes proposed; and if they deem the same necessary to be taken, will ascertain and determine the damages or compensation which ought justly to be made by said company to the owners of or persons interested in each particular description of real estate mentioned in said petition who have demanded said jury; and they shall be entitled to two dollars for each day they are engaged in the performance of their duties, to be paid in the first instance by the company. The said judge, or a circuit court commissioner to be designated by him, may attend said jury, to decide questions of law and administer oaths to witnesses, and he may appoint the sheriff or other proper officer to attend and take charge of said jury while engaged in said proceedings. And the jury shall proceed to determine the amount of damages to be awarded, and shall have all the powers hereby conferred upon commissioners; and a report signed by the jury, where the judge is or is not in attendance, shall be valid and legal. At any time before the report of the jury or commissioners shall be made to the court it shall be competent for the company, after sufficient cause has been shown and with leave of the court, to discontinue all pending proceedings in any case and to institute new proceedings at any time thereafter; but

the company in all such cases shall pay all the costs of such proceeding so discontinued, with an attorney fee, to be taxed as in cases at law.

(167) § 8256. SEC. 22. On such report being made by the commissioners or jury, the court, on motion, shall confirm the same on the next or any subsequent day when in session, unless for good cause shown by either party; and when said report is confirmed, said court shall make an order containing a recital of the substance of the proceedings in the matter of the appraisal, and a description of the real estate or property appraised, for which compensation is to be made, and shall also direct to whom the money is to be paid, or when and where it shall be deposited by the company. Said court, as to the confirmation of such report, shall have all the powers usual in other cases.

(168) § 8257. SEC. 23. A certified copy of the order so to be made shall be recorded in the office of the register of deeds for said county, in the book of deeds; and thereupon, on the payment or deposit by the said company of the sum to be paid as compensation for such land, franchise, or other property, and for costs, expenses, and counsel fees as aforesaid, and as directed by said order, the company shall be entitled to enter upon and take possession of and use the said land, franchise, and other property for the purpose of its incorporation; and all persons who have been made parties to the proceedings, either by publication or otherwise, shall be divested and barred of all right, estate, and interest in such real estate, franchise, or other property, until such right or title shall be again legally vested in such owner; and all real estate, or property whatsoever, acquired by any company under and in pursuance of this act, for the purpose of its incorporation, shall be deemed to be acquired for public use: Provided, The said sum [to] be paid as damages, and compensation, and costs, expenses, and counsel fees as aforesaid, shall be paid by the company, or deposited as provided in this act, within sixty days after the confirmation of said report by the said court; and in case said company fail or neglect so to do, such failure or neglect shall be deemed as a waiver and aban-

donment of the proceedings to acquire any rights in said land or property. Within twenty days after the confirmation of the report of the commissioners or jury, as above provided for, either party may appeal, by notice in writing to the other, to the supreme court, from the appraisal or report of the commissioners or jury; such notice shall specify the objections to the proceedings had in the premises, and the supreme court shall pass on such objections only and all other objections, if any, shall be deemed to have been waived; such appeal shall be heard by the supreme court of any general or special term thereof, on notice thereof being given according to the rules and practice of the court. On the hearing of such appeal, the court may direct a new appraisal before the same or new commissioners or jury, in its discretion. The second report shall be final and conclusive upon all parties interested. If the amount of the compensation to be allowed is increased by the second report, the difference shall be a lien on the land appraised, and shall be paid by the company to the parties entitled to the same, or shall be deposited as the court shall direct; and in such case, all costs of the appeal shall be paid by the company; but if the amount is diminished, the difference shall be refunded to the company by the party to whom the same may have been paid, and judgments therefor and for all costs of the appeal shall be rendered against the party so appealing. On the filing of the report, such appeal, when made by any claimant of damages, shall not affect the said report as to the right and interests of any party, except the party appealing; nor shall it affect any part of said report in any case, except the part appealed from; nor shall it affect the possession of such company of the land appraised; and when the same is made by others than the company, it shall not be heard except on a stipulation of the party appealing not to disturb such possession during the pendency of such proceedings.

